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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHRISTOPHER BOND, LAWRENCE GRAHAM, GEORGE CAMP, EDWARD HAYNES, and DONALD WYRICK,
Petitioners,

v.

CALVIN BURKS, JAMES X. HALL, ROOSEVELT MARTIN, WILLIE NORWOOD, DOUGLAS W. THOMPSON, JAMES E. WILLIAMS and DARRYL HINES, and all other prisoners similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an award of attorneys' fees, made pursuant to Title 42 U.S.C. §1988, should be proportioned to accurately reflect the extent to which a plaintiff has prevailed on the merits of his lawsuit in the District Court?[1]

2. Whether expenses for expert witnesses and other litigation expenses not included by Congress as recoverable costs under Title 28 U.S.C. §1920 are "costs" which may be awarded by a District Court under the umbrella of Title 42 U.S.C. §1988?[2]

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[1]Certiorari has been granted by the Court on this precise question in *Hensley* v. *Eckerhart*, No. 81-1244. Briefs on the merits have been filed in *Hensley* v. *Eckerhart*, and oral argument is scheduled in the case for November 3, 1982. In addition, the Court has granted certiorari in *Planned Parenthood Association of Kansas City, Missouri* v. *Ashcroft*, Nos. 81-1255 and 81-1623. Again, in No. 81-1623, this precise question has been accepted for review by certiorari. Also, a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit has presented the following question for review:

> "Whether an award of attorney's fees under Section 706(k) of Title VII of the Civil Rights Act of 1964 should be approportioned to reflect the extent to which the plaintiff did not prevail on the issues and claims presented in the litigation. [Footnote omitted]." *Delta Airlines, Inc.* v. *Thornberry*, No. 82-192.

Because the attorneys' fees provisions of Title VII are so similar to 42 U.S.C. §1988, the question in the *Delta Airlines* case is very closely related to the issue presented by the present case and by both *Hensley* and *Planned Parenthood*. Finally, a similar issue is presented by the petition in *Rivera* v. *City of Riverside*, No. 82-156. The issue presented by the present case is as precisely delineated, or more so, as is the issue in the other cases pending before this Court on the same topic, because the opinions of the District Court on the merits in the present litigation present a clear blueprint of the massive failures of plaintiffs' counsel for which attorneys' fees were awarded.

[2]A similar issue is presented by the petition for certiorari in *Delta Airlines, Inc.* v. *Thornberry*, No. 82-192, except that the *Delta Airlines* case arises under Title VII.

INDEX

Questions Presented I

Citations III

Opinions Below 1

Jurisdiction 2

Relevant Statutory Provisions 2

Statement of the Case 6

Reasons for Granting the Writ 18

I. The decision of the Eighth Circuit, affirming per curiam the Memorandum and Order of the District Court, conflicts with the decisions of other Courts of Appeals as to the proper interpretation of 42 U.S.C. §1988 with respect to the concept of prevailing party 21

II. The Court of Appeals, by affirming per curiam the action of the District Court in awarding out-of-pocket expenses and expert witness fees not specifically authorized by Title 28 U.S.C. §§1821 and 1920, has acted in conflict with the applicable statutes, the precedent of this Court and the decisions of other circuits 24

Conclusion 28

Appendix A
(Per Curiam Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit, entered on July 26, 1982) A-1

Appendix B
(Opinion and Order of the United States District Court for the Western District of Missouri, entered on July 20, 1981) A-3

CITATIONS

Cases

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 25, 27

Batiste v. Furnco Construction Corporation, 503 F.2d 447, 451 (7th Cir. 1971), *cert. denied*, 420 U.S. 928 (1975) 23

Baum v. United States, 432 F.2d 85 (5th Cir. 1970) 25

Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978) 22

Burks v. Teasdale, 492 F.Supp. 650 (W.D.Mo. 1980) ... 2, 4

Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979) 2, 15

Burks v. Walsh, 461 F.Supp. 454 (W.D.Mo. 1978) ... 2, 4, 14

City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367 (1st Cir. 1971) 26

Copeland v. Marshall, 641 F.2d 880 (D.C.Cir. 1980) .. 22, 23

Delta Airlines, Inc. v. Thornberry, No. 82-192 (pet. for cert. U.S.S.Ct.) ..... I, 20

Equal Employment Opportunity Commission v. Safeway Stores, Incorporation, 597 F.2d 251 (10th Cir. 1979) 23

Farmer v. Arabian American Oil Company, 379 U.S. 227 (1964) 24

Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980) 23

Henkel v. Chicago, St. Paul, Minneapolis, & Omaha Railway Company, 284 U.S. 444 (1931) 24

Hensley v. Eckerhart, No. 81-1244 (pet. for cert. U.S.S.Ct.) ..... I, 19

Hughes v. Repko, 578 F.2d 483 (3rd Cir. 1978) 23

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) .. 22, 23, 26

Kinsey v. Legg Mason Wood Walker, 23 FEP Cases 774 (D.D.C. 1978), *aff'd*, 605 F.2d 572 (D.C.Cir. 1979) 25

Lamphere v. Brown University, 610 F.2d 46 (1st Cir. 1979) 22

Morton v. Charles County Board of Education, 373 F.Supp. 394 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir. 1974) 23

Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980) 21, 23

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 23

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) 22

Pearson v. Western Electric Company, Western Electric Installation Organization District Office, 542 F.2d 1150 (10th Cir. 1976) 23

Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, Nos. 81-1255 and 81-1623 (pet. for cert. U.S.S.Ct.) .....I, 20

Rivera v. City of Riverside, No. 82-156 (pet. for cert. U.S.S.Ct.) .....I, 20

Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) 23

Seigel v. Merrick, 619 F.2d 160 (2nd Cir. 1980) 22

Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979) 23

Sherkow v. Wisconsin, 630 F.2d 498 (7th Cir. 1980) 21

Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2d 190 (9th Cir. 1969) 25

Wahl v. Carrier Manufacturing Co., Inc., 511 F.2d 209 (7th Cir. 1975) 25

Walker v. Robbins Hose Company No. 1, Inc., 622 F.2d 692 (3rd Cir. 1980) 23

Wehr v. Burroughs Corporation, 477 F.Supp. 1012 (E.D.Pa. 1979), *aff'd*, 619 F.2d 296 (3rd Cir. 1980) 25

Statutes and Miscellaneous Citations

28 U.S.C. §1254(1) 2

28 U.S.C. §1821 .....2, 19, 24, 27

28 U.S.C. §1920 .....5, 19, 24, 25, 27

42 U.S.C. §1988 .....5, 7, 16, 18, 19, 21, 26

6 *Moore's Federal Practice*, ¶54.77 [5.-3] at 1734, 1741, 1751 (2d ed. 1982) 25, 26

10 *C. Wright & A. Miller, Federal Practice & Procedure*, §2677 at 223-226 (1973) 26

10 *C. Wright & A. Miller, Federal Practice & Procedure*, §2678 at 236-237 (1973) 25

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The per curiam opinion and judgment of the United States Court of Appeals for the Eighth Circuit was entered in this case on July 26, 1982. The opinion is unreported and has been attached hereto as Appendix A. The "Opinion and Order" of the United States District Court for the Western District of Missouri, pertaining to the issue of attorneys' fees and expenses, was entered on July 20, 1981. The "Opinion and Order" is unreported and has been attached to this brief as Appendix B.

In the District Court, this case, on the merits, was divided into two separate and distinct parts for purposes of trial and disposition. With respect to allegations of overcrowding and unsanitary conditions at the Missouri State Penitentiary, the opinion of the District Court is reported as *Burks* v. *Walsh*, 461 F.Supp. 454 (W.D.Mo. 1978). The District Court's opinion on the merits, with respect to allegations concerning the provision of medical care at Missouri State Penitentiary, is reported as *Burks* v. *Teasdale*, 492 F.Supp. 650 (W.D.Mo. 1980). In regard to the first half of the bifurcated trial proceedings, the plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit. The trial court was affirmed in a case reported as *Burks* v. *Teasdale*, 603 F.2d 59 (8th Cir. 1979).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was filed on July 26, 1982. This petition for certiorari is being filed within ninety (90) days of the date on which the judgment of the Eighth Circuit was entered. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Title 28 U.S.C. § 1821

"(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Con-

gress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182 (d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section."

Title 28 U.S.C. § 1920

"A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

Title 42 U.S.C. § 1988

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State where-

in the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

On the merits, the District Court proceedings represented major and important prison litigation involving the Missouri State Penitentiary, the largest prison and only maximum security penal institution in Missouri. For purposes of trial, disposition and remedy, the case was bifurcated by the District Court. The first half of the case, involving issues with respect to overcrowding, prison conditions, and sanitation at the penitentiary, was tried over a period of six days in September and October of 1978. Those issues resulted in an opinion filed by the District Court on November 3, 1978, reported at 461 F.Supp. 454 (W.D.Mo. 1978). The second half of the case, involving medical issues, was tried over a ten day period in February, 1980. The opinion of the District Court with respect to the medical issues was filed on May 23, 1980, and is reported at 492 F.Supp. 650 (W.D.Mo. 1980).

The plaintiffs appealed from the Opinion of the Dis-

trict Court on the merits on the first half of the trial proceeding below. The fact of that appeal indicates that the plaintiffs felt aggrieved by the decision of the District Court on the overcrowding and conditions issues. The Eighth Circuit affirmed the District Court and afforded no further relief to plaintiffs whatsoever in an opinion reported at 603 F.2d 59 (8th Cir. 1979).

The merits of this expansive prison litigation in the District Court is not relevant per se to this petition. However, because the defendants take the position that the District Court erred by failing to proportion the attorneys' fees awarded, pursuant to provisions of Title 42 U.S.C. §1988, to accurately reflect the extent to which plaintiffs prevailed, a summary of the various issues placed into controversy before the lower court will be included to place the issues into context. The defendants do not ask that this Court, without the benefit of a full transcript or record and without personal observation of counsel before, during and after trial, assess the relative success of the parties for attorneys' fees purposes. The defendants are requesting that the principle be established that attorneys' fees are to be awarded to plaintiffs' counsel only for prevailing and not for substantial failures. Thereafter, the case should be remanded to the District Court for a determination of the extent to which plaintiffs were successful and for an award of fees to fairly reflect the degree to which they prevailed.

The substantial failure of the plaintiffs to secure significant relief via litigation in the District Court is best exemplified and demonstrated by examining the issues present, on the merits, before the District Court and the extent to which those issues resulted in equitable relief.

During the trial of the first half of this lawsuit in September and October of 1978, the plaintiffs raised a

myriad of issues concerning the living conditions of the Missouri State Penitentiary. These issues included the following:

1. The adequacy of sanitation at MSP.

2. The cleanliness of all areas of the penitentiary.

3. Noise levels in the housing units at MSP.

4. The physical condition of the cell blocks at MSP.

5. The physical condition of all the other areas of the penitentiary.

6. The adequacy and sufficiency of the showers in the housing units at MSP.

7. The adequacy of the ventilation and cooling system of the housing units.

8. The adequacy of the system for heating the housing units at MSP.

9. The adequacy and sufficiency of the recreational facilities available to inmates at MSP.

10. The adequacy of the kitchen and food service areas of the penitentiary in the following respects:

(a) Maintenance and repair.

(b) Insect, rodent control.

(c) Cleanliness and sanitation.

(d) Adequacy of the food.

11. The adequacy of the dining facility at MSP in the following respects:

(a) Maintenance.

(b) Cleanliness and sanitation.

(c) Congestion and sufficiency of time to eat.

(d) Sufficiency of the arrangement of the tables.

(e) Violence in the dining hall.

12. The adequacy of the canteen and the provision of canteen privileges at the facility.

13. The adequacy and sufficiency of inmate employment opportunities, or to state it another way, excessive idleness in prison industry at MSP.

14. Sufficiency and adequacy of other inmate activities in such areas as social clubs and religious organizations.

15. The adequacy and sufficiency of inmate educational opportunities in both the academic and vocational education areas.

16. The adequacy of the guard force at MSP.

17. The adequacy of laundry services at MSP.

18. The propriety of the system of classification of inmates utilized at MSP.

19. Excessive levels of violence, assault, homosexuality and suicide within MSP.

The plaintiffs also raised a number of issues in support of their general contention that the Missouri State Penitentiary was unconstitutionally overcrowded. In essence, the plaintiffs attacked every housing unit at MSP as being unconstitutionally overcrowded. These units included Housing Units 1, 2, 3, 4, 5, 6, 7, 9, the Adjustment Unit and the Administrative Segregation Unit. The primary thrust of the plaintiffs' attack upon the housing units at the Missouri State Penitentiary in terms of overcrowding was an effort to eliminate the use of dormitories

at the facility and to prevent the defendants from housing more than one inmate per cell in any of the housing units.

The second half of the trial in the *Burks* case took place in February, 1980. As a broad proposition the second half of this lawsuit involved an attack upon the health care delivery system at the Missouri State Penitentiary.

In its opinion of May 23, 1980, the District Court described "at least" 21 specific areas wherein the plaintiffs sought relief regarding the delivery of medical services at the penitentiary during the trial of this cause. The issues so identified are as follows:

1. To restrain guards from inflicting unnecessary pain on MSP prisoners or patients and to post the order throughout the hospital.

2. To prohibit nonphysicians from performing nonemergency surgery.

3. To prohibit any surgery at MSP which involves blood transfusions or general or spinal anesthesia except in emergency situations.

4. To mandate the hiring of more custodial personnel to accompany inmates who must be sent to other medical facilities.

5. To prohibit defendants' employees from writing violation reports for alleged malingering except with the written authorization or approval of the Chief Medical Officer.

6. To mandate the institution of an evaluative review of the civilian medical assistants who are employed at MSP, and a timetable for any further training that an individual medical assistant might require.

7. To mandate that defendants employ the equivalent of two full time physicians at MSP at least five days a week and at least eight hours a day.

8. To mandate the continuation of the correctional medical services program until there are two full time physicians.

9. To mandate the hiring of sufficient numbers of registered nurses in order to offer round-the-clock coverage on MSP's second floor.

10. To mandate the hiring of a registered nurse to supervise and assist the medical assistants during sick call.

11. To mandate the initiation of a uniform record keeping system and to institute a record keeping training program for the inmate nurses and the medical assistants.

12. To mandate the hiring of civilians to work in the medical records department and to prohibit the use of inmates for this purpose.

13. To mandate the writing of protocols for common diseases for use by the medical assistants at sick calls.

14. To mandate the provision of chairs at sick call and the provisions of greater privacy at sick call.

15. To mandate the staffing of the intensive care unit with a registered nurse or medical assistant 24-hours per day.

16. To mandate the provision of a monitor, defibrillator and other life saving equipment in ICU.

17. To mandate the installation of a standard nurse call button system for nonambulatory patients.

18. To mandate the hiring of a full time professional registered physical therapist to work in the physical therapy department.

19. To prohibit the confining of any inmate in the fifth floor psychiatric ward without physician approval, or in

the absence of a physician, upon the physician's verbal order.

20. To prohibit the use of restraints in the fifth floor psychiatric ward except under orders of a physician and mandate the review of such order every 12 hours thereafter.

21. To mandate the production of data on all inmates who have chronic conditions in order to assess these inmates' working and living arrangements.

The defendants believe that the issues raised by the plaintiffs in their attack upon the health care delivery system at the penitentiary actually went far beyond the issues identified by the District Court as those actually tried in the courtroom. There were a number of additional issues which the plaintiffs raised through the pretrial phase of this case and on which their attorneys most logically spent a good deal of time and effort. These were issues which the plaintiffs were unable to pursue or chose not to pursue at the time this half of the case was tried and upon which they obtained no relief whatsoever. These issues which were raised within the ambit of the plaintiffs' complaint in their attack upon the health care system at the penitentiary are as follows:

1. The adequacy of the dental services provided inmates at the Missouri State Penitentiary.

2. The adequacy of the X-ray department at MSP.

3. The adequacy of psychiatric care and counseling given to inmates in the general population at MSP.

4. The adequacy of the pharmacy at MSP including its operation and the manner in which medications are made available and distributed to the inmates.

5. The prohibition of using inmates to work in any area of the MSP hospital.

6. The sufficiency of emergency services provided at the MSP hospital.

7. The adequacy of the laboratory at MSP.

8. The necessity of providing at least periodic physical examinations to the inmates at MSP.

9. The adequacy of special diets provided to patients at MSP.

10. The adequacy of sick call as it is provided to inmates in segregation units at MSP.

11. The improper use of psychotropic medications at MSP.

12. The adequacy of the initial or entrance physical examination at MSP.

13. Excessive morbidity and mortality rates among inmates at MSP.

14. The performance of medical research on inmates at MSP.

15. The adequacy of procedures utilized at MSP hospital for the fourth floor contagious disease ward.

16. The adequacy of furnishings in the hospital at MSP.

17. The propriety of locking patients who may be disciplinary problems in their rooms when they are patients in the hospital.

When the District Court rendered its decision after the conclusion of the trial of the first half of this lawsuit in September of 1978, it afforded the plaintiffs absolutely no relief whatsoever on any of the issues that can be described as relating to the conditions of the Missouri State Penitentiary. In effect, the plaintiff obtained absolutely

no relief from the District Court with regard to the 19 separate and distinct "conditions" issues identified *supra*. They did not prevail.

The District Court began its discussion of the overcrowding issue by stating:

> "However, because there is so much acreage within the walls (47.8), because of the many and varied activities available to the inmates, and because of the relative freedom enjoyed by the inmates to utilize the recreational areas and the many activities available to them, the Missouri State Penitentiary, viewed as a whole, is not now so overcrowded to be intolerable, inhumane, totally unreasonable in light of the modern conscience, or shocking to the conscience of the Court. . . ." 461 F.Supp. at 487, 488.

After reaching this initial conclusion the lower court then examined the overcrowding issue as it pertained to the various housing units within the Missouri State Penitentiary.

Initially, it should be emphasized that the lower court rejected the two major issues being pressed by the plaintiffs in this case with regard to overcrowding. The court did not order that double celling be eliminated at the Missouri State Penitentiary in its entirety nor did it direct that the defendants be required to reduce the population at the penitentiary to some so-called "designed capacity." Second, the court completely rejected the plaintiffs' argument that the use of dormitories at the Missouri State Penitentiary be discontinued.

Specifically, the District Court approved the double celling of inmates in Housing Units 1, 3, 4, the Punitive Segregation Unit and the Administrative Segregation Unit. The District Court also found constitutional the ar-

rangements in the dormitories at the Missouri State Penitentiary which included Housing Units 6, 7 and 9.

The District Court did order that double celling be eliminated in Housing Units 2 and 5 and that, with the exception of emergency situations, triple celling not be utilized in Housing Unit 1, the Administrative Segregation Unit or the Punitive Segregation Unit.

The plaintiffs appealed with respect to the extent of the relief afforded on the overcrowding issue and the timetable for compliance. *Burks* v. *Teasdale*, 603 F.2d 59 (8th Cir. 1979). The clear inference is that plaintiffs were aggrieved by the extent they prevailed on the overcrowding issues. Nevertheless, the Eighth Circuit affirmed.

As noted, the District Court identified "at least" twenty-one separate issues upon which the plaintiffs sought relief at the trial of the second half of this lawsuit. The District Court rejected the plaintiffs' request for relief in *sixteen of these twenty-one areas.*

In its opinion the District Court did afford the plaintiffs some relief in the following five areas:

1. The issue of nonphysician surgery.

2. The issue of transfer practices from the Missouri State Penitentiary to the University of Missouri Medical Center.

3. The issue of the availability of adequate life saving equipment in the Intensive Care Unit.

4. The adequacy of medical records.

5. The restraint policy in the psychiatric unit at MSPH.

To a limited degree, on these five issues, out of twenty-one identified by the trial court, the plaintiffs prevailed.

Conversely, on sixteen of twenty-one issues identified, plaintiffs lost. Quite obviously, the plainiffs also failed to obtain any type of relief on those issues pursued by them during the course of this litigation but abandoned by them prior to the trial of this cause in February of 1980. Seventeen such issues have been identified *supra*.

The foregoing detailed explanation, of the various issues involved in this litigation before the District Court, is intended to assist this Court for appeal purposes to appropriately assess the truly limited degree to which the plaintiffs prevailed in this important and protracted litigation. The defendants do not suggest that it is appropriate for this Court to make a determination, based upon the limited record before it, of the relative success of the parties for purposes of ordering an equitable award of attorneys' fees under Title 42 U.S.C. §1988. Nevertheless, the defendants believe that the explanation given of the issues is truly persuasive evidence that the award of attorneys' fees made by the trial court is inequitable and outside the letter and intent of the Civil Rights Attorneys' Fees Award Statute.

At that point when the District Court conducted its hearing pertaining to the issues of attorneys' fees and expenses on February 23 and 24, 1981, the fees and expenses claimed on behalf of the plaintiffs was as follows: for Mr. Michael J. Hoare, based upon a requested hourly rate of $60 per hour for non-trial work and $75 per hour for trial days, $91,411.50 was requested in attorneys' fees, based on approximately 1,456 hours (App. B at 4-5); for Richard Boardman, for 662 total hours claimed, at rates varying from $35 to $60 an hour depending on the year in which the services were provided, plaintiffs requested $31,640 (App. B at 5-6); for Steven G. Gladstone, for 285.6 claimed hours, at hourly rates from $35 to $65 an

hour depending upon the year in which the service was rendered, the plaintiffs claimed $12,969.65; for Mr. John D. Lind, at the rate of $10 an hour as a law clerk and $50 per hour later as an attorney, the plaintiffs requested $6,760; for expenses, the American Civil Liberties Union, who was not a party to the action, claimed $25,102.44. In the "Opinion and Order" of July 20, 1981, from which the defendants now appeal, the District Court awarded a total of $107,592.93 in attorneys' fees and $23,646.42 in expenses (App. B at 25). Broken down by attorney and/or law clerk, the District Court awarded $70,960.50 to Mr. Hoare, $23,854.76 to Mr. Boardman, $8,956.63 to Mr. Gladstone, and $3,820.04 to Mr. Lind (App. B at 21-22). The District Court expressly declined to adopt a proportionate success formula in calculating the attorneys' fees which should be awarded in this case (App. B at 7). Rather, after the lower court had disregarded certain of the hours claimed for various reasons, and had reduced the hourly rate with respect to certain hours to reflect the relative work value of the plaineiffs' attorneys and the customary hourly rate in the community, all hours claimed by the attorneys for the plaintiffs in this singularly unsuccessful prison litigation were accepted as a basis for awarding attorneys' fees. Stated differently, the District Court reduced the total attorneys' fees requested by the plaintiffs from $142,781.15 to $107,592.93. However, that reduction specifically did not take into account the relative extent to which the plaintiffs failed to prevail altogether in the litigation.

The expenses were awarded to the American Civil Liberties Union. Out-of-pocket expenses and expert witness fees were included. The expert fees were contingent upon payment by the defendants. The experts did not charge the plaintiffs or the ACLU for their time. We quote:

"Second, defendants argue that with regard to expert witnesses fees no award should be made because none of the witnesses has been paid. Apparently, each expert witness testified pursuant to an agreement that would afford payment should the ACLU recover its expenses. Mr. Frank Susman, President of the ACLU for Eastern Missouri, testified that none of the doctors has formally submitted a fee request. In response to a question from this Court, Mr. Susman indicated that the amounts on the supplemental exhibit would be the normal amounts these experts charge for their services. While some of the expert fees seem rather high, this Court has not been shown that they are unreasonable for these experts' time. Therefore, these expert witness fees will be assessed as reasonable expenses in the prosecution of this case." (App. B at 24).

The District Court awarded out-of-pocket expenses pursuant to 42 U.S.C. §1988, after acknowledging that the propriety of such action presented an unresolved question (App. B at 23). Such esoteric items were compensated as attorney travel expenses, law clerk salaries of the ACLU, telephone charges, publications, secretarial services, photographs, and office rental.

The Eighth Circuit affirmed by per curiam opinion.

REASONS FOR GRANTING THE WRIT

In a per curiam opinion, the Eighth Circuit summarily affirmed the judgment of the United States District Court for the Western District of Missouri awarding $107,592.93 in attorneys' fees and $23,646.42 in out-of-pocket expenses and expert witness fees to plaintiffs to be taxed against defendants. The opinion of the District Court, as affirmed by the Eighth Circuit, did not proportion the

attorneys' fees awarded so as to accurately reflect the extent to which the plaintiffs prevailed on separate, and separable, claims and issues advanced in this litigation. The District Court did disallow certain claimed fees which were clearly not allowable pursuant to Title 42 U.S.C. §1988. The District Court did not, however, reduce the fee award to accurately reflect the relative successes of the parties. The District Court, as affirmed by the Eighth Circuit, also awarded out-of-pocket expenses and expert witness fees. The vast majority of out-of-pocket expenses awarded do not comport with the costs specifically made taxable by Congress in Title 42 U.S.C. §1920. In addition, the expert witness fees allowed by the District Court were greatly in excess of the witness fees established by Congress in Title 28 U.S.C. §1821. The allowance of expert witness fees is especially repugnant because the plaintiffs were not required to pay their experts any fees for their testimony, the experts have not and do not intent to ask that the plaintiffs, or that the American Civil Liberties Union, pay them fees for their services, and the expert witness fees were contingent upon payment being ordered against defendants. In effect, the American Civil Liberties Union determined that it would be nice for defendants to pay the experts testifying for plaintiffs a fee and were able to secure payment of the same from the District Court.

The issues addressed by this petition for writ of certiorari are presently before the Court in other litigation. In *Hensley* v. *Eckerhart*, No. 81-1244, this Court has granted certiorari to address precisely the same attorneys' fees issue as raised by this petition. Argument is set in *Hensley* v. *Eckerhart* for November 3, 1982. In the context of the attorneys' fees provisions of Title VII, a petition for writ of certiorari on similar issues, including both the matter of attorneys' fees and out-of-pocket expenses, has

been filed in *Delta Airlines, Inc.* v. *Thornberry*, No. 82-192. Also, this same attorneys' fees issue is one of the questions presented by *Planned Parenthood Association of Kansas City, Missouri, Inc.* v. *Ashcroft*, Nos. 81-1255 and 81-1623, for which certiorari has been granted by this Court. Finally, a similar attorneys' fees issue has been raised by petition for writ of certiorari in *Rivera* v. *City of Riverside*, No. 82-156. It is especially important that the present case be granted certiorari because the opinions of the District Court, on the merits of the controversy, are so clear with respect to identifying the issues litigated, both those issues which resulted in relief being afforded to the plaintiffs and those issues which resulted in vindication of the defendants and their maximum security prison.

The facts which are presented by the present case clearly delineate the inequities which can result from an award of attorneys' fees in complex litigation for all time expended by the attorneys for plaintiffs. In the course of this litigation in the District Court, and including the trial and disposition of each portion of the lawsuit as bifurcated by the trial court, 51 separate and distinct factual issues, each with potential legal consequences, was presented to the trial court for consideration and disposition. These 51 separate and distinct issues do not account for at least 20 additional issues which were pursued during the course of this litigation, and which have been partially identified in the "STATEMENT OF THE CASE" portion of this brief, but were ultimately abandoned or did not result in specific disposition by opinion. The plaintiffs prevailed, to a limited degree in some cases, on 9 of these issues, and, with respect to the overcrowding issues which were made the basis of judicial relief, the lower court merely required by order that the defendants adhere to a timetable in reducing the population of certain

units at the Missouri State Penitentiary, which timetable was obviously based upon the defendants' own schedule for certain building and improvement projects. That schedule had been approved and funded substantially in advance of the trial of the case. It is important to note that, in almost every instance, each of the multitude of issues advanced by the plaintiffs was in fact distinct and separable, *i.e.*, each of the issues could have served as an independent basis for a separate one issue lawsuit. Obviously, if the plaintiffs had initiated multiple lawsuits to address individual issues, they would have lost the vast majority of those lawsuits and have received no fees for lost cases.

I.

The decision of the Eighth Circuit, affirming per curiam the Memorandum and Order of the District Court conflicts with the decisions of other Courts of Appeals as to the proper interpretation of 42 U.S.C. §1988 with respect to the concept of prevailing party.

Except for other cases presently pending before this Court as indicated above, the Court has not previously been confronted with the precise issue contested in this case. However, there are numerous lower federal court decisions addressing this and closely related issues. To put is mildly, the lower federal courts have not reached a consensus on the issue. Indeed, different panels of the same Court of Appeals have disagreed.[3] The majority of federal appellate courts have, however, adopted a position in accord with the position being advanced by the petitioners herein. Before citing the Court to conflicting lower court precedent, the

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[3]Compare the Seventh Circuit opinions in *Sherkow* v. *Wisconsin*, 630 F.2d 498 (7th Cir. 1980) and *Muscare* v. *Quinn*, 614 F.2d 577 (7th Cir. 1980).

petitioners emphasize that a distinction should be made between a multiple claim situation as in the present case, and a case involving more than one legal theory in support of a specific type of relief. It is not entirely unreasonable for an attorney to be awarded research time for alternative, and often imaginative, legal theories when a court was required to rely upon only one theory in order to grant the relief requested. Such a result is commonplace in those cases where plaintiffs plead both constitutional and statutory theories. A much different situation prevails, however, in a case, like the present one, in which multiple claims for relief, each supported by separate and distinct allegations of constitutional deprivation, are maintained by plaintiffs. Many of the leading cases which have adopted a position apparently adverse to that being taken by the petitioners in this case did concern situations in which alternative legal theories, as opposed to multiple claims, were at issue. The proper distinction between these two different factual situations has been made by the United States Court of Appeals for the District of Columbia in *Copeland* v. *Marshall*, 641 F.2d 880, 892 n.18 (D.C.Cir. 1980).

Apparently in accord with the position taken by the District Court in this case, that once a party has been determined as having prevailed, regardless of the extent, all hours reasonably claimed should be considered in making an attorneys' fees award, are the Eighth Circuit, the Fifth Circuit, and the Sixth Circuit. See *Brown* v. *Bathke*, 588 F.2d 634 (8th Cir. 1978); *Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir. 1981); and *Northcross* v. *Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979). In addition, there are decisions from the First and Second Circuits which conflict with other precedent out of those circuits favorable to the petitioners. See *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979); and *Seigal* v. *Merrick*, 619 F.2d 160 (2nd Cir. 1980). Except for *Jones* v.

Diamond, supra, these cases have primarily been concerned with the alternative legal theory situation. However, the Fifth Circuit reached its result in ambivalent terms. *Jones* v. *Diamond*, 636 F.2d at 1382 (5th Cir. 1981).

In accord with the position taken by the petitioners are the District of Columbia Circuit, the leading case in the First Circuit, the Third Circuit, the Fourth Circuit, the Seventh Circuit, and the Ninth Circuit. *Copeland* v. *Marshall*, 641 F.2d 880, 891-892 (D.C.Cir. 1980); *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978); *Hughes* v. *Repko*, 578 F.2d 483, 487 (3rd Cir. 1978); *Walker* v. *Robbins Hose Company No. 1, Inc.*, 622 F.2d 692 (3rd Cir. 1980); *Morton* v. *Charles County Board of Education*, 373 F.Supp. 394, 411 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir. 1974); *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 447, 451 (7th Cir. 1971), *cert. denied*, 420 U.S. 928 (1975); *Muscare* v. *Quinn*, 614 F.2d 577, 580 (7th Cir. 1980); *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972); and *Sethy* v. *Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979). We also submit that the Tenth Circuit has adopted a position in support of the principle being advanced by the petitioners. See *Pearson* v. *Western Electric Company, Western Electric Installation Organization District Office*, 542 F.2d 1150 (10th Cir. 1976); and *Equal Employment Opportunity Commission* v. *Safeway Stores, Incorporated*, 597 F.2d 251 (10th Cir. 1979). However, the precise position of the Tenth Circuit has been complicated by apparently conflicting language in *Gurule* v. *Wilson*, 635 F.2d 782, 791-794 (10th Cir. 1980).

These conflicts between the lower federal courts, and specifically the conflict between the action taken by the Court of Appeals and District Court in this case and the positions maintained by the majority of the Circuit Courts of Appeals, justify the grant of certiorari in this matter.

II.

The Court of Appeals, by affirming per curiam the action of the District Court in awarding out-of-pocket expenses and expert witness fees not specifically authorized by Title 28 U.S.C. §§1821 and 1920, has acted in conflict with the applicable statutes, the precedent of this Court and the decisions of other circuits.

In holding that federal courts have the authority to award as "costs" expenditures for expert witness fees and out-of-pocket expenses, not specifically authorized by Title 28 U.S.C. §1920, the District Court, affirmed summarily by the Court of Appeals, has placed itself in conflict not only with statutory limitations on recoverable costs, but also with prior decisions of this Court and decisions in other circuits.

In 1931, this Court rejected the existence of any equitable authority in the lower courts to allow expert witness fees to be taxed as costs, stating, "[s]pecific provisions as to amounts payable and taxable as witness fees were made by Congress as early as the Act of February 28, 1979," and noting that under these and subsequent provisions, "additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the Federal Courts." *Henkel* v. *Chicago, St. Paul, Minneapolis, & Omaha Railway Company*, 284 U.S. 444, 446-447 (1931). The successor to that 1799 enactment is 28 U.S.C. §1821.

The absence of any equitable discretion or authority generally to award as costs expenses beyond those allowed by 29 U.S.C. §1920 also was addressed by this Court in *Farmer* v. *Arabian American Oil Company*, 379 U.S. 227, 235 (1964). There, the Court rejected the existence of any inherent authority to award a prevailing party witness expenses beyond those allowed by statute, stating, "[w]e do

not read that Rule [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case." More recently, in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Court held that expansion of the term "costs" beyond those items statutorily authorized by Congress is inappropriate. Although the case directly involved awards of attorneys' fees as "costs," the statutory history discussed by the Court is equally applicable to other awards of expenses beyond those expressly authorized.

Pursuant to the statutory limitations and the foregoing precedent, and contrary to the Court of Appeals' decision below, the circuit courts traditionally have held that federal courts do *not* have discretion to tax as costs expenses for consultants, experts and investigators.[4] Several circuits also have rejected the existence of any discretion to award other types of litigation expenses (*e.g.*, postage, messengers, telephone, travel, typing, supplies, office photocopy, etc.) not included by Congress in 28 U.S.C. §1920.[5] On the other hand, the decision below is supported

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[4]*See, e.g., Baum* v. *United States*, 432 F.2d 85, 86 (5th Cir. 1970) ("Expert witness fees, above subsistence and travel, will not be taxed against the losing party."); *Wehr* v. *Burroughs Corporation*, 477 F.Supp. 1012, 1022 (E.D.Pa. 1979), *aff'd*, 619 F.2d 296 (3rd Cir. 1980) (denying expert witness fees in an age discrimination case and holding that even experts who testify at trial are entitled only to subsistence and mileage); *Twentieth Century Fox Film Corporation* v. *Goldwyn*, 328 F.2d 190, 223-224 (9th Cir. 1969) (denying expert witness fees in an antitrust case even though they had been incurred as a necessary part of the plaintiff's case). *See also*, 6 *Moore's Federal Practice*, ¶54.77 [5.-3] at 1734, 1741, 1751 (2d ed. 1982); 10 *C. Wright & A. Miller, Federal Practice & Procedure*, §2678, at 236-237 (1973).

[5]*Wahl* v. *Carrier Manufacturing Co., Inc.*, 511 F.2d 209, 217 (7th Cir. 1975); *Kinsey* v. *Legg Mason Wood Walker*, 23 FEP Cases 774, 777 (D.D.C. 1978), *aff'd*, 605 F.2d 572 (D.C.Cir. 1979); *City Bank of*

(Continued on next page)

by the Sixth Circuit's *Northcross* decision, *supra*, and in part by a recent decision of the Fifth Circuit.[6]

The actions of the lower courts in this case are made more reprehensible and inequitable by the fact that each of plaintiffs' expert witnesses, as ordered reimbursed by the trial court, will not be reimbursed absent payment by the defendants. The expenses of the experts who testified in this case, as represented by their expert witness fees, are not out-of-pocket expenses of the plaintiffs, nor would the plaintiffs ever be required to reimburse these experts. The experts will be paid sizable fees only if the coffers of the State of Missouri are used for that purpose. In fact, the majority of these "experts" testified at trial that they were not being reimbursed at all. In effect, the District Court has converted 42 U.S.C. §1988 to the Civil Rights Expert Witness Fees Awards Act and has created a category of contingent expert fees to be paid by defendants in civil rights litigation. Given that the plaintiffs, as supported by their expert witnesses, were singularly unsuccessful in this prison litigation, it should not be surprising that defendants strongly resent paying contingent expert witness fees to the plaintiffs' experts.

The actions of the lower courts in reimbursing plaintiffs for out-of-pocket expenses not specifically covered by federal statutes relating to costs and for expert witness fees raises an important federal question. This Court has not been called upon, since the enactment of 42 U.S.C. §1988, to determine whether out-of-pocket expenses and expert witness fees may be awarded under the umbrella of that

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Footnote continued

Honolulu v. *Rivera Davila*, 438 F.2d 1367, 1371 (1st Cir. 1971). *See generally*, 6 *Moore's Federal Practice*, ¶54.77[8] at 1751 (2d ed. 1982); 10 *C. Wright & A. Miller, Federal Practice & Procedure*, §2677 at 223-226 (1973).

[6]*Jones* v. *Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981).

legislation. Certainly, in the present case, the vast majority of expenses awarded do not comport with items of costs as identified and defined by previously enacted, and still effective, federal legislation. See 28 U.S.C. §§1821 and 1920. In the absence of implicit or explicit congressional intent to expand the definition of "costs" in the federal courts, the American Rule should be applied. *Alyeska Pipeline Service Company* v. *Wilderness Society*, 421 U.S. 240 (1975).

CONCLUSION

For the foregoing reasons and authorities, petitioners request this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Attorneys for Petitioners.

October, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Calvin Burks; James X. Hill; Roosevelt Martin; Willie Norwood; and all other prisoners similarly situated, *Appellees,* v. Lawrence Graham, individually and as Director of the Department of Social Services, State of Missouri; George Camp, Social Services; Edward Haynes, Director of Division of Corrections, State of Missouri; Donald Wyrick, M.S.P., *Appellants.* • • • •	No. 81-1936
Douglas W. Thompson; James E. Williams, *Appellees.* v. Christopher Bond, et al., *Appellants.* • • • •	Appeal from the United States District Court for the Western District of Missouri
Darryl Hines, *Appellee.* v. Joseph Teasdale, et al., *Appellants.*	

Submitted: February 10, 1982

Filed: July 26, 1982

Before HEANEY and ARNOLD, Circuit Judges, and OVERTON,* District Judge.

PER CURIAM.

The above-named Missouri officials appeal an order of the district court awarding appellees attorneys fees

*The Honorable WILLIAM R. OVERTON, United States District Judge for the Eastern District of Arkansas, sitting by designation.

under 42 U.S.C. § 1988 and expenses. The fee and expense award arose from a class action instituted in 1975 challenging the conditions of confinement at the Missouri State Penitentiary. In that suit, the appellees obtained relief on some of their claims relating to overcrowding and the adequacy of the prison's health care delivery system. After a two-day evidentiary hearing, the court found that the appellees were entitled to $107,592.93 in attorneys fees and $23,646.42 in expenses.

We have carefully considered the record and the briefs on appeal, and conclude that the district court did not err in its findings of fact and conclusions of law. Accordingly, we affirm on the basis of the district court's well-reasoned opinion. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CALVIN BURKS, et al., *Plaintiffs,* v. CHRISTOPHER BOND, et al., *Defendants.*	Nos. 77-4008-CV-C 75-100-CV-C 78-4093-CV-C

OPINION AND ORDER

The sole remaining issues in this exhaustive litigation are the questions of an appropriate award of attorneys' fees and expenses pursuant to 42 U.S.C. §1988. A full hearing on these issues was held in Kansas City, Missouri from February 23, 1981 to February 24, 1981.

I.

The magnitude of this seven year old litigation cannot be overstated. *See, Burks v. Walsh*, 461 F. Supp. 454 (W.D. Mo. 1978), *aff'd. sub. nom. Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); and *Burks v. Teasdale*, 492 F. Supp. 650 (W.D. Mo. 1980). This case involved a substantial constitutional challenge to many conditions of confinement at the Missouri State Penitentiary ("MSP") in Jefferson City, Missouri. The two opinions of this Court identified constitutional deficiencies relating to the overcrowding and to the medical treatment of inmates at MSP. Consistent

with the preceding phases of this litigation, the quesions relating to attorneys' fees and expenses are intensely contested by the parties and have been briefed and argued in elaborate detail. Initially, this Court will recognize the participants and outline the types of claims advanced by plaintiffs' counsel.

THE ATTORNEYS

Plaintiffs were represented by several counsel, each contributing in varying degrees to the processing of this litigation.

Michael J. Hoare

Mr. Hoare is a partner in the St. Louis, Missouri law firm of Chackes and Hoare. He has held this position from September, 1976 to the present. He has had extensive litigation experience in the federal courts. Prior to his association with Chackes and Hoare, Mr. Hoare was an assistant professor of law at St. Louis University School of Law, a legal consultant with the Massachusetts Commission against Discrimination, and a trial attorney with the United States Department of Justice. Mr. Hoare graduated from American University Law School in Washington D. C. in 1967 in the top 10% of his class. He is admitted to practice in the District of Columbia, Massachusetts, and Missouri.

Mr. Hoare's affidavit as supplemented on April 9, 1981 indicates a total time expenditure of 1,456.00 hours on this litigation since he entered an appearance in this case in March, 1978. He is claiming a fee based on $60.00 per hour for all non-trial work and $75.00 per hour for trial days. At the hearing held on February 23 and 24, 1981, Mr. Hoare testified that he had expended 232.5 hours for trial days in this cause and 1200 hours for non-trial work.

His supplementation of the record indicates an additional 8 hours of trial time for this Court's hearing on February 24, 1981 and an additional 22.9 hours for non-trial activities. The total amount claimed for trial work amounts to $18,037.50 and the total amount claimed for non-trial work amounts to $73,374.00. The total remuneration sought is $91,411.50.

Richard Boardman

Mr. Boardman is currently engaged in private law practice in Clayton, Missouri. He has a general practice excluding corporate, taxation and criminal matters. He has had extremely limited exposure to trial work in the federal courts. From 1974-1978, Mr. Boardman was a full-time faculty member at St. Louis University School of Medicine where he held the rank of Assistant Professor of Community Medicine. Prior to this affiliation, Mr. Boardman worked with the Legal Aid Society of St. Louis from 1969-1974 in differing capacities. From 1966 to 1969, he was Assistant Professor of Law at the Law School of the Catholic University of America in Washington, D. C. Mr. Boardman graduated with honors from the University of North Dakota Law School in 1965 and was Articles Editor of the North Dakota Law Review. Additionally, Mr. Boardman received a master of laws degree from Yale University Law School in 1966. He is admitted to practice in North Dakota and Missouri.

Mr. Boardman's total claimed number of hours expended during his participation in this litigation is 646 hours plus his time expended at the hearing held February 23 and 24, 1981.[1]

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[1]Apparently, this would add another 16 hours to Mr. Boardman's figures resulting in a total of 662 hours.

Mr. Boardman's rates for his legal services varied over the years that this litigation proceeded. His rates for 1975 through March, 1977 were $35.00 per hour; his rates from April 1977 through September, 1977 were $40.00 per hour; his rates from October 1977 through May, 1979 were $45.00 per hour; his rates from June, 1979 through May 1980 were $50.00 per hour; and since June 1980, his rates have been $60.00 per hour. Mr. Boardman was requested at the hearing to provide a breakdown of his claims at the different rates. He provided the following information:

108.3 hours at $35.00	=	$ 3,790.50
29.1 hours at $40.00	=	1,164.00
41.5 hours at $45.00	=	1,867.50
416.8 hours at $50.00	=	20,840.00
50.3 hours at $60.00	=	3,018.00
16 hours at $60.00	=	960.00
Total Claim	=	$31,640.00

Steven G. Gladstone

Mr. Gladstone is a partner in the Columbia, Missouri law firm of Gladstone and Matteson. Mr. Gladstone has had some federal court litigation experience in representing indigents. He graduated from the University of Missouri-Columbia School of Law in the upper one-third of his class in 1972. He is admitted to practice in Missouri.

Mr. Gladstone's total number of claimed hours can be broken down as follows: 269.6 hours through 1978, 8 hours in 1980, and 8 hours for the hearing on February 23, 1981. These hours total 285.6. His hourly rates have varied over the years in the following manner; pre-1977, $35.00 per hour; 1977, $40.00 per hour; 1978, $50.00 per hour; 1980 unknown; 1981, $65.00 for trial work and $45.00 for non-trial work. Based upon Mr. Gladstone's affidavit and his testimony, his claim unfolds as follows:

pre-1977	86 hours at $35.00	=	$ 3,010.00
1977	29.1 hours at $40.00	=	1,164.00
1978	134.6 hours at $50.00	=	6,730.00
1980	8 hours at $50.00[2]	=	400.00
1981	8 hours at $65.00	=	520.00

plus 27.5 hours estimated at an average of pre-1977, 1977 and and 1978 rates or $41.66 per hour which equals $1,145.65[3]

Total Claim = $12,969.65

John D. Lynn

Mr. Lynn is an attorney in the St. Louis, Missouri law firm of Chackes & Hoare. Prior to this employment, he worked as law clerk to Judge Hogan of the Missouri Court of Appeals, Southern Division, in Springfield, Missouri. His work on this case was largely in the capacity of law clerk to Mr. Hoare during the first phase of this litigation. He graduated from New York University Law School in May, 1979. He is admitted to practice in Missouri.

Mr. Lynn's affidavit reflects that he worked 476 hours in 1978. He testified that he was requesting $10.00 per hour for the work performed as a law clerk. He testified that he worked an additional 2 days or 16 hours in 1980 and 3 days or 24 hours preparing for and participating in the hearing held on February 23 and 24, 1981. He is requesting an hourly fee of $50.00 for these latter hours. Mr. Lynn's total claim amounts to $6,760.00.

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[2]The record is unclear what Mr. Gladstone's rate was for 1980 so this Court assumes that it was the same as 1978.

[3]Mr. Gladstone's affidavit shows an estimated time of 27.5 hours over the period prior to 1979 for miscellaneous matters. The record is unclear what portion of these hours were in what time period so this Court has added the hourly rates for the pre-1977, 1977, and 1978 periods and divided by 3 for an average rate of $41.66 per hour.

Other Attorneys

Mr. Phillip Fishman participated in this case from 1975 through September 1977. He withdrew from the case and is not now seeking any attorney's fee.

Sister Susanna Jones is a nun and a newly licensed attorney in Missouri. She was actively involved in the trial of the second phase of this litigation. By letter dated February 2, 1981, Sister Jones informed this Court that any monies received for her services would have to be forwarded to the Benedictine Order of which she is a member, and that any enrichment of her Order as a result of the "suffering of prison inmates" would be inappropriate. Hence, she has withdrawn her claim for any attorney's fee.

Along with all of the attorneys mentioned, numerous law students participated in the early stages of this litigation. Their claims fall within the expense claims discussed below.

Expenses Claimed

The American Civil Liberties Union ("ACLU") financed the costs of this litigation. These expenses are adequately detailed in plaintiffs' supplemental exhibit (plaintiffs' exhibit #7 filed February 23, 1981). The total claim is for $23,259.06 plus $1,843.38 for expenses relating to the hearing on February 23 and 24, 1981. These two figures amount to $25,102.44. Plaintiffs also advance two separate theories for an enhancement of this claim. First, plaintiffs argue that this Court should assess prejudgment interest on this amount at a rate of approximately 10% which would boost the claim by $2,511.18. Alternatively, plaintiffs argue that the claim should be adjusted to reflect inflation which according to plaintiffs would raise their claim by $3,801.26.

II.

Liability under 42 U.S.C. § 1988

42 U.S.C. § 1988 provides, in relevant part:

> In any action or proceeding to enforce a provision of Section . . . [42 U.S.C. § 1988] the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

The initial step required in an analysis of this section is to determine if plaintiffs are to be considered the prevailing party to this litigation. Defendants in their 46 page brief in opposition to an award of attorneys' fees argued strenuously that plaintiffs only prevailed on a portion of the many claims advanced. Hence, defendants argued that this Court should award a fee, if any, based upon a mechanical ratio of those claims in which plaintiffs were successful to those claims decided adversely to plaintiffs.

This Court was presented with the identical argument recently in *Eckerhart v. Hensley*, No. 75-CV-87-C, (W.D. Mo., filed Jan. 23, 1981). For the reasons expressed in that opinion, this Court declines to adopt defendant's proportionate success formula. *See also, Planned Parenthood Association v. Ashcroft*, Nos. 80-1130 & 80-1530 (8th Cir. Filed July 8, 1981); and *Crain v. Mountain Home*, 611 F.2d 726, 729 n.7, (8th Cir. 1979). In a case of this magnitude, involving the conditions at an important state institution, this Court refuses to attempt to artificially segregate the issues in this litigation and make isolated assignments of success. It is the opinion of this Court that the entire record in this case compiled over a seven year period clearly reflects a monumental effort on the part of plaintiffs and a substantial degree of success in improving the conditions

at MSP. The impact of the orders affecting overcrowding and medical treatment have had wide-ranging effects on the institution as a whole. Further, it would be incalcuable to determine the degree of influence this litigation has had on state officials to bring about necessary changes at MSP. This Court is left with the distinct impression that this litigation was a crucial element in the forces seeking improvements at MSP in the last seven years. Therefore, this Court considers plaintiffs to have prevailed for purposes of 42 U.S.C. §1988.

III.

Having determined that plaintiffs are the prevailing parties, this Court is now drawn into the minutia of an exhaustive and tedious dispute between the parties over the amounts claimed by plaintiffs. The starting point in a discussion of what a reasonable fee should be in this case is *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714, 717-19 (5th Cir. 1974). *Johnson* established the appropriate guidelines to be considered in determining an award of attorneys' fees.[4] The twelve factors to be considered are as follows:

1. time and labor involved
2. novelty and difficulty of the question
3. skill requisite to perform the legal services properly
4. preclusion of other employment due to acceptance of the case

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[4]The Eighth Circuit has recently continued its adherence to the *Johnson* standards in *Ladies Center, Inc. v. Thone*, No. 80-1884 (8th Cir. filed April 9, 1981) Slip. Op. at p. 3; also, see generally, A. Miller, *ATTORNEYS' FEES IN CLASS ACTIONS*, (Federal Judicial Center, 1980).

5. customary fee
6. fixed or contingent fee
7. time limitations imposed by the client or the circumstances
8. amount involved and the results obtained
9. experience, reputation and ability of the attorneys
10. undesirability of the case
11. nature and length of professional relationship with client
12. awards in similar cases

A. *TIME AND LABOR INVOLVED*

Defendants have raised any number of specific objections to the hours plaintiffs' counsel have claimed. For clarity, this Court will discuss each attorneys' claim in turn incorporating a discussion of defendants' objections.

Mr. Hoare

Mr. Hoare acted as chief trial counsel in both phases of this litigation. His affidavit adequately identifies the various services he performed in conjunction with the preparation and trial of this case. Defendants advance a number of objections to specific line items on Mr. Hoare's affidavit. Many of the objections raised by defendants are consistent with their proportional success theory previously discussed and hence require no further discussion. Other items that are contested will be addressed in order.

i.) *Work Performed on Appeal*

Defendants strenuously object to the hours tallied by Mr. Hoare for the work he performed on the appeal of the first phase of this litigation. *See, Burks v. Teasdale, supra,*

603 F.2d 59. They argue first that the appeal was unsuccessful and second, that the appropriate forum for an award of attorneys' fees for work performed on appeal would be the Eighth Circuit. Counsel for plaintiffs have cited cases from the First and Fifth Circuits which seem to authorize the district court to make awards of attorneys' fees for work performed on appeal. *See, Souza v. Southworth*, 564 F.2d 609, 613-14 (1st Cir. 1977); *Davis v. Board of School Commissioners of Mobile County*, 526 F.2d 865, 867-68 (5th Cir. 1976); and *Kingsville Independent School District v. Cooper*, 611 F.2d 1109, 1114 (5th Cir. 1980). Nevertheless, it is the understanding of this Court that the Eighth Circuit considers attorneys' fees motions itself. *See, Grueschow v. Harris*, No. 80-1632, (8th Cir. filed December 4, 1980); *Women Services v. Thone*, No. 80-1885, (8th Cir. filed May 14, 1981); *Ladies Center v. Thone, supra; Zoll v. Eastern Allamakee Community School Dist.*, 588 F.2d 246, 252 (8th Cir. 1978); and *Allen v. Amalgamated Transit Union Local* 788, 554 F.2d 876, 884 (8th Cir. 1977).

Both reason and policy considerations support this practice. Only the Eighth Circuit is truly in a position to review the work performed by attorneys on appeal. This Court had no opportunity to view the oral arguments and while plaintiffs' counsel filed his appellate briefs for review, this Court is ill-equipped to judge the quality or effectiveness of the brief in light of the actual results obtained.

Also, there is a more fundamental question of jurisdiction. Although not deciding the question the Supreme Court in *Hanrahan v. Hampton*, 64 L. Ed. 670 (1980), assumed the proposition that courts of Appeal were authorized to award attorneys' fees for work performed in such forums. There, the Supreme Court noted, "[a]ccordingly, in the present case, the Court of Appeals was authorized

to award to respondents the attorneys' fees attributable to their appeal only if, by reason of obtaining a partial reversal of the trial court's judgment, they 'prevailed' within the meaning of §1988." *Id.* at 673.

Whatever the merits of plaintiffs' argument, the Eighth Circuit affirmed this Court's decision granting plaintiffs no additional relief. *See, Burks v. Teasdale, supra,* 603 F.2d 59. As such, this Court fails to see how plaintiffs can be considered the "prevailing" party for purposes of those proceedings.

Therefore, this Court will disallow Mr. Hoare those hours[5] claimed for his work in the Eighth Circuit.[6]

ii.) *Work Performed During Non-trial Phases of the Case.*

Defendants object to a number of non-trial hours claimed by Mr. Hoare. Defendants object to the hours claimed by Mr. Hoare in preparing the remedial proposal for the first phase of this litigation because this Court did not adopt the provisions of plaintiffs' proposal. This Court cannot agree with defendants that Mr. Hoare is not entitled to any compensation for this work. This work was necessary in order for Mr. Hoare to have properly represented his clients and was useful to this Court in fashioning a remedy for that stage of these proceedings.

Defendants next object to the hours claimed by Mr. Hoare for a trip to Chicago, Illinois to attend an American Medical Association conference on health care in prisons.

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[5]Mr. Hoare testified that he only spent 97.4 hours on the appeal and the defendants contend that his affidavit shows 129.9 hours. This Court has conducted an independent examination of the affidavit and concludes that 116.6 hours are claimed.

[6]This decision certainly would not prevent Mr. Hoare from filing a request for attorneys' fees with the Eighth Circuit.

While this Court is confident that this trip was a learning experience for Mr. Hoare, this Court has not been shown how this trip was reasonably necessary to the preparation of the lawsuit. Therefore, this Court will disallow those hours claimed for this trip.

Defendants also object to a variety of smaller claims, i.e., 12.5 hours "searching for court order", 41 hours for conferences with Mr. Lynn, 7 hours for "review of situation", 8 hours for "telecon" regarding reprisals on October 17, 1978, 10 hours for cleaning up and organizing files, 15 hours for deciding whether or not to enter an appearance in the case, the hours for the second remedial proposal, the hours for preparation of the fee motions, and the time spent in seeking continuances. Viewed separately, this Court finds nothing unusual about the hours for these types of claims. All of these activities are a part of the general gristmill of litigation. These hours will be allowed.

iii.) *Work Performed at Trial*

Mr. Hoare is seeking compensation for 232.5 hours for trial days. In his testimony, he broke this down in the following fashion: 121.75 hours actually spent in court and 110.75 hours before and after trial each trial day. This Court observes that 232.5 hours in 16 trial days roughtly approximates 14.5 hours per day. This Court is unable to accept this total of claimed hours. While it may be possible for an attorney in the heat of trial to spend such vast quantities of time, this Court would still be required to find such expenditures unreasonable. Therefore, this Court will reduce Mr. Hoare's claim for trial days by 25%.

With the above-listed adjustments, this Court finds that a reasonable number of allowable hours for Mr. Hoare's time and labor is 1052.40 hours for non-trial activity and 174.38 hours for trial activity. The total number is 1226.78 hours.

Mr. Boardman

Of Mr. Boardman's 662 hours claimed, 504.7 hours were computed from an informal time-keeping system that he used prior to February 25, 1980. The 504.7 hour figure was a "reconstruction" based on a review of his appointment book, travel documents and monthly summaries. After reviewing the record in this case and from having been the trial judge in this action, this Court is unable to accept the 504.7 hour figure without more sufficient evidence to support it. Therefore, this Court will reduce Mr. Boardman's claim prior to February 25, 1980 by 25%.

Defendants raise a few specific objections to Mr. Boardman's claim. Defendants object to hours claimed in seeking continuances and visitation of clients. For the reasons expressed in the discussion of Mr. Hoare's claim for non-trial activity, defendants' objections are overruled. Also, defendants object to Mr. Boardman's time claimed for a "side trip" to Washington D. C. to visit the headquarters of the ACLU National Prison Project. On this point, these hours will be disallowed consistent with the analysis denying Mr. Hoare his time for this trip to Chicago.

In accordance with these adjustments, the reasonable number of hours for Mr. Boardman's time and labor can be broken down as follows:

Prior to February 25, 1980—384.90 hours

Including and subsequent
to February 25, 1980—140.9 hours

Total—528.8

Mr. Gladstone

Mr. Gladstone has claimed 285.6 hours in this litigation. His claim is similar to that of Mr. Boardman's in the re-

spect that the affidavit reflects an estimated reconstruction of his time for the period 1975-1977. Since January, 1978, Mr. Gladstone testified that he maintained careful track of his time. After a review of the record in this case and upon consideration of the lack of proper documentation for the claim, this Court will reduce Mr. Gladstone's pre-1978 claim by 25%.

Defendants have objected to some of the items on Mr. Gladstone's affidavit. The most strenuous objection is to a 27.5 hour claim based upon an estimated compilation of various non-specific miscellaneous matters. This Court must agree with defendants that such estimated claims are without proper evidentiary support and will be excluded.

Defendants also object to time claimed for meetings held with other ACLU attorneys, for trips to the penitentiary, and for certain phone calls and letters. Defendants failed to show this Court how these items were not reasonably necessary to the prosecution of this action. This Court finds nothing objectionable about any of these activities as described.

Therefore, based upon the foregoing, the hourly breakdown for Mr. Gladstone is as follows:

pre-1978—	80.7 hours
1978—February 23, 1981—	150.60
Total	215.3 hours[7]

Mr. Lynn

In reviewing Mr. Lynn's affidavit, this Court will make some adjustments in Mr. Lynn's figures. For the summer of 1978 when Mr. Lynn was a law clerk in the office

[7]This figure excludes the 27.5 hours described above.

of Mr. Hoare, he is claiming 8 hours per day of billable time. This Court is unable to accept an 8 hour per day figure as reasonable in light of the type of work that Mr. Lynn was performing. As such, only 5 hours per day for those in-office hours will be allowed. This reduction will also apply for the in-office hours claimed in 1980 and 1981. Further, consistent with the preceding analysis for Mr. Hoare, Mr. Lynn's claim for trial hours will be reduced by 25% based upon a careful review of the record and having observed Mr. Lynn during the trial of the first phase of this litigation.

In accordance with the above, Mr. Lynn's allowable hours are as follows:

June 12, 1978—August 11, 1978—382 hours
September 21, 1978—
November 6, 1978—103.88 hours
1980— 10 hours
1981— 21 hours
Total—372.88

B. *NOVELTY AND DIFFICULTY*

The elastic standards of 8th Amendment review make any case of this type both novel and difficult. The challenge for plaintiffs' counsel to demonstrate institutionally based constitutional deficiencies was enormous. These types of cases involve huge expenditures of time for the parties and place extensive demands upon the courts. *See, Burks v. Walsh, supra*, 461 F. Supp. 454; *Burks v. Teasdale, supra*, 603 F.2d 59; and *Burks v. Teasdale, supra*, 492 F. Supp. 650.

C. *REQUISITE SKILL*

While overall performances varied during the different stages of this litigation, all counsel were sufficiently skilled to perform the various functions that each ultimately supplied.

D. *PRECLUSION FROM ALTERNATIVE EMPLOYMENT*

No case of the size and complexity of this litigation can fail to have an effect upon an attorneys' practice. To differing degrees, all of the attorneys for plaintiffs had to sacrifice time that could have been put to other uses.

E. *CUSTOMARY FEE*

Mr. Hoare

As a partner in a small St. Louis law firm, this Court finds nothing unreasonable in Mr. Hoare's request for $75.00 per hour for trial hours. This figure comports with similar rates known to this Court. For the non-trial hours, the $60.00 per hour figure is slightly high for an attorney with Mr. Hoare's background and experience. Hence, this Court will allow a non-trial hour rate of $55.00 per hour.

Mr. Boardman

Mr. Boardman is a solo practitioner in Clayton, Missouri. He has very little federal court experience and has a small general practice. Mr. Boardman's rates are reasonable except that Mr. Boardman's post-May, 1980 rate for in-office work will be held to $55.00 per hour as this figure is more reasonable for an attorney of Mr. Boardman's experience.

Mr. Gladstone

Mr. Gladstone is a young attorney in Columbia, Missouri. He practices in a small law office. As this Court is

aware of the fees generally commanded in the mid-Missouri region, and in view of the record in this action, a reasonable fee for an attorney of Mr. Gladstone's background and experience would be $40.00 per hour. Mr. Gladstone's pre-1977 claim for $35.00 per hour is reasonable.

Mr. Lynn

For his work as a law clerk to Mr. Hoare, this Court is unable to accept the claimed rate of $10.00 per hour. Given the size of the law firm and the nature of its practice, a rate of $8.00 per hour is reasonable for the type of summer clerkship Mr. Lynn performed. Further, a reasonable rate for Mr. Lynn's time as a beginning associate is $35.00 per hour.

F. *FIXED OR CONTINGENT FEE*

This suit only sought declaratory and injunctive relief. Plaintiffs' counsel performed in this case on the expectation that should they prevail, a reasonable attorneys' fee would be awarded. There was no fee arrangement of any type with the inmate class at MSP.

G. *TIME LIMITATIONS IMPOSED BY CLIENTS AND/OR CIRCUMSTANCES*

A review of the affidavits submitted reveals numerous trips to Jefferson City for client contacts. These trips required journeys of over 240 miles round trip. Apart from the travel inconvenience, this Court is keenly aware of the difficult nature of inmate representation and the incumbent time demands.

H. *THE AMOUNT INVOLVED AND THE RESULTS OBTAINED*

This was not a damage action, so there was no monetary relief afforded. But, two injunctions have been issued

that have substantially altered conditions at MPS. The overall impact of this litigation upon the lives of the inmate class would be difficult to measure. Nevertheless, the reduction of the overcrowding situation and the improvements in medical care will have a significant positive effect on the lives of the inmates.

I. *EXPERIENCE, REPUTATION AND ABILITY OF COUNSEL*

This consideration has been adequately addressed above. See, Section I.

J. *UNDESIRABILITY*

The defendants argued that because all of the attorneys involved in this case are members of the ACLU, they therefore considered this project desirable. It does not follow that while each individual attorney might personally favor litigation of this type, that he/she would become personally involved. The case was arduous for plaintiffs' counsel. At every stage they were met with an able and tenacious defense. The time involved in litigation of this type without a fee paying client would make this an undesirable case for a private attorney.

K. *NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENTS*

Plaintiffs' counsel represented a class of all current and future inmates confined at MSP. Mr. Boardman and Mr. Gladstone have been involved in this litigation since 1975 and Mr. Hoare and Mr. Lynn since 1978. From a review of the affidavits and from observing plaintiffs' counsel during the many stages of this litigation, this Court is satisfied that the plaintiffs were competently represented during the pendency of this lengthy case.

L. *AWARDS IN SIMILAR CASES*

This Court has had many cases of this type and is familar with the awards in such cases. *See, e.g., Eckerhart v. Hensley, supra.*

Based upon an exhaustive review of the file in this case, the affidavits filed by plaintiffs' counsel, the testimony presented at the February 23 and 24, 1981 hearing, the documentary evidence, and the briefs filed in support of plaintiffs' motion and those filed in opposition thereto, this Court finds the following to be reasonable attorneys' fees for this action:

Mr. Hoare

Non-trial hours—	$57,882.00
Trial hours—	13,078.50
Total =	$70,960.50

Mr. Boardman

May 23, 1975-February 22, 1977—	$ 2,632.88
March, 1977-September, 1977—	873.00
October, 1977-May 1979—	1,400.63
June, 1979-February 22, 1980—	12,830.25
February 25, 1980-April 29, 1980—	3,725.00
June 10, 1980-February 24, 1981—	2,387.00
Total =	$23,854.76

Mr. Gladstone

1975-1976—	$ 2,060.63
1977—	873.00
1978—February 23, 1981	6,024.00
Total =	$ 8,957.63

Mr. Lynn

June 12, 1978-August 11, 1978—	$ 1,904.00
September 21, 1978-November 6, 1978—	831.04
1980—	350.00
1981—	735.00
Total =	$ 3,820.04

ENHANCEMENT

Plaintiffs' counsel have requested that this Court enhance the fees by an "appropriate percentage" citing *Cleverly v. Western Electric Co., Inc.*, 450 F. Supp. 507 (W.D. Mo. 1978), *Aff'd. Cleverly v. Western Electric Co., Inc.*, 594 F.2d 638 (8th Cir. 1979). As this Court noted in *Eckerhart v. Hensley, supra*, the *Cleverly* Court first arrived at a minimum fee and then reviewed the *Johnson* standards to determine if the fee should be enhanced. As the *Johnson* factors have already been considered, no enhancement would be appropriate.

IV.

EXPENSES

Lastly, plaintiffs are seeking to recover their out of pocket expenses pursuant to 42 U.S.C. §1988.[8] Plaintiffs are claiming expenses for expert witnesses, depositions, transcripts, attorney expenses, law clerk salaries, telephone

[8]This Court observes that recovery of out of pocket expenses pursuant to 42 U.S.C. §1988, rather than 28 U.S.C. §1920 (1976 & Supp. II 1978), is an unresolved issue in the Eighth Circuit. See, Ladies Center v. Thone, supra, slip. op. at 5-6. In the past, this Court has invoked 28 U.S.C. §1920 in making such expense awards. See, Eckerhart v. Hensley, supra. In any event, the Eighth Circuit in Ladies Center affirmed Judge Urbom's expense award made pursuant to 42 U.S.C. §1988.

charges, copying costs, publications, expedited mail delivery, typing services, photographs and office rental. Plaintiffs' Exhibit #7 adequately lists all of these expenses.

As mentioned earlier in this opinion, plaintiffs also seek an enhancement of the amount of their expenses either to compensate for inflation or based on a prejudgment interest type theory. This Court is unaware of any authority allowing for either enhancement theory advanced by plaintiffs. Further, Plaintiffs have not adequately shown the policy rationales that would favor increases in expense awards under either theory. Therefore, this Court declines to adopt either of plaintiffs' enhancement theories.

Regarding the balance of the expenses claimed, the defendants raise a number of objections. First, defendants argue that because the expenses have been advanced by the ACLU, a non-party to this action, the request should be denied. It has not been demonstrated how this factor should make any difference in assessing the necessary expenses. In a sense, plaintiffs have merely "borrowed" these funds from the ACLU in order to prosecute their claims.

Second, defendants argue that with regard to expert witness fees no award should be made because none of the witnesses has been paid. Apparently, each expert witness testified pursuant to an agreement that would afford payment should the ACLU remover its expenses. Mr. Frank Susman, President of the ACLU for Eastern Missouri, testified that none of the doctors had formally submitted a fee request. In response to a question from this Court, Mr. Susman indicated that the amounts on the supplemental exhibit would be the normal amounts these ex-

perts charge for their services. While some of the expert fees seem rather high, this Court has not been shown that they are unreasonable for these experts' time. Therefore, these expert witness fees will be assessed as reasonable expenses in the prosecution of this case.

Third, defendants object to a number of smaller expenses. (1) Defendants object to the expenses incurred by Mr. Hoare to go to the AMA seminar in Chicago. As Mr. Hoare's attorney's fees for this trip have already been denied, the expenses will likewise be subtracted. (2) Defendants object to plaintiffs' subscriptions to various prison related publications. While such materials may be available at other sources, the $44.50 expense claimed is not excessive. (3) Defendants object the $122.29 figure for expedited mail service. There is no record from which to conclude that this service was unreasonable. Therefore, it will be allowed. (4) Defendants object to the $135.30 figure for office rental in Jefferson City during the trial of the second portion of this case. This expense was not unreasonable in that local counsel's offices were 20 miles away in Columbia, Missouri.

From a careful review of plaintiffs' exhibit #7, this Court will disallow the expenses attributable to the appeal of the first phase of this litigation consistent with the disallowance of Mr. Hoare's attorney fees. See Section III, A, i. Specifically, the 1979 copying costs of $135.02, the transcript cost of $630.13 for the first phase of this litigation, and the $434.33 expense for Mr. Hoare's trip to St. Paul to argue the appeal will be subtracted.

In accordance with the foregoing, this Court concludes that the reasonable expense amount allowable is $23,646.42.

V.

ORDER

Upon plaintiffs' application for attorneys' fees and expenses, consistent with the foregoing opinion, it is hereby

ORDERED that plaintiffs be awarded an attorneys' fee of $107,592.93 to be assessed against defendants; it is further

ORDERED that plaintiffs be awarded expenses of $23,646.42 to be taxed against defendants.

Elmo B. Hunter
SENIOR UNITED STATES DISTRICT JUDGE

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NO. 82-747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHRISTOPHER BOND, LAWRENCE GRAHAM, GEORGE CAMP, EDWARD HAYNES, and DONALD WYRICK,
Petitioners,

v.

CALVIN BURKS, JAMES X. HALL, ROOSEVELT MARTIN, WILLIE NORWOOD, DOUGLAS W. THOMPSON, JAMES E. WILLIAMS and DARRYL HINES, and all other prisoners similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Michael J. Hoare
CHACKES, HOARE & SEDEY
Attorneys for Respondents
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St. Louis, Missouri 63102
314/241-7961

QUESTIONS PRESENTED FOR REVIEW

Petitioners' Questions Presented do not adequately reflect the circumstances of this case, requiring Respondents' to submit the following:

1. Whether the District Courts under 42 U.S.C. 1988 have discretion to award the prevailing plaintiff an attorney's fee predicated in part on professional services reasonably rendered on factual or legal issues related to the successful claim(s) without regard to whether the plaintiff prevailed also on each of the related factual and/or legal issues.

2. Whether the District Courts have discretion to award the prevailing plaintiff expenses for expert witnesses and other costs of litigation not specifically included as recoverable costs under 28 U.S.C. 1920.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statement of Case	1
Summary of Argument	11
Argument	12
Conclusion	17

TABLE OF AUTHORITIES

Cases	Pages
Baum v. United States, 432 F.2d 85 (5th Cir. 1970)	17
Brown v. Bathke, 558 F.2d 634 (8th Cir. 1978)	13, 14
Burks, et al. v. Bond, et al. (Civil Action Nos. 77-4008-CV-C; 75-100-CV-C; 78-4093-CV-C, W.D. Mo., July 20, 1981)	2, 3, 4, 9, 12, 13
Burks v. Teasdale, 492 F.Supp. 650, (W.D. Mo. 1980)	2, 5, 6, 7, 8, 9, 12
Burks v. Walsh, 461 F.Supp. 454 (W.D. Mo. 1978), aff'd. sub nom **Burks v. Teasdale**, 603 F.2d 59 (8th Cir. 1979)	2,5, 12
City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367(1st Cir. 1971)	17
Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)	13, 14
Crain v. Mountain Home, 611 F.2d 726 n. 7, (8th Cir. 1979)	2
Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974)	13, 16
Eckerhart v. Hensley, No. 75-CV-87-C, (W.D. Mo., filed Jan. 23, 1981)	2
EEOC v. Kenosha Unified School District No. 1, 620 F.2d 1220 (7th Cir. 1980)	15
Estelle v. Gamble 429 U.S. 97 (1976)	7
Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964)	15, 17
Gluck v. American Protection Industries, Inc., 619 F.2d 30 (9th Cir. 1980)	14
Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980)	13
Henkel v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 284 U.S. 444 (1932)	15
Hughes v. Repko, 578 F.2d 483 (3rd Cir. 1978)	13, 14
Johnson v. Georgia Highway Express, 408 F.2d 714 (5th Cir. 1974)	3
Jones v. Diamond, 636 F.2d 1364 (5th Cir. en banc 1981), cert. dismissed, 102 S.Ct. 27 (1982)	13, 15
Kinsey v. Legg Mason Wood Walker, 23 F.E.P. Cases 774 (D.D.C. 1978), affirmed without opinion, 505 F.2d 572 (D.C. Cir. 1979)	17
Lamphere v. Brown University, 610 F.2d 46 (1st Cir. 1979)	13, 14
Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980)	13, 14
Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)	13, 14
Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979)	13, 15
Pennsylvania v. O'Neill, 431 F.Supp. 700 (E.D. Pa. 1977), affirmed without opinion, 573 F.2d 1301 (3rd Cir. 1978)	15

Planned Parenthood Assoc. v. Ashcroft, Nos. 80-1130 and 80-1530, (8th Cir., filed July 8, 1981) 2

Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201 (3rd Cir. 1981) 16

Schaeffer v. San Diego Yellow Cabs, Inc., 642 F.2d 1002 (9th Cir. 1972) 13

Seattle School District No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980) 14

Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979) 13

Siegal v. Merrick, 619 F.2d 160 (2nd Cir. 1980) 13

Syvock v. Milwaukee Boiler Manufacturing Company, Inc., 665 F.2d 149 (7th Cir. 1981) 15

Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240 (9th Cir. 1982) 15

Todaro v. Ward, 431 F.Supp. 1129, aff'd., 565 F.2d 48 (2 Cir. 1977) 7

Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964) 17

Wahl v. Carrier Manufacturing Co., 511 F.2d 209 (7th Cir. 1975) 17

Wehr v. Burroughs Corp., 477 F.Supp. 1012 (E.D. Pa. 1979), affirmed, 619 F.2d 276 (3rd Cir. 1980) 17

Wheeler v. Durham City Board of Education, 585 F.2d 618 (4th Cir. 1978) 15

Wolff v. McDonnell, 418 U.S. 539 (1974) 5

STATUTES AND OTHER AUTHORITIES CITED

28 U.S.C. §1988 in passim

House Committee Report, 94-1558, 94th Cong., 2d Sess. (1976) 16

Senate Committee Report, 94-1011, 94 Cong. 2d Sess. (1976) 16

NO. 82-747

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Petitioners' Statement of the Case is unfair and improper, requiring Respondents to submit the following alternative statement.

A. Facts Relevant to Attorneys' Fees and Expenses.

The questions of attorneys fees and costs were initially raised by Plaintiffs' Motion for Interim Attorney's Fees and Costs filed with the district court on or about May 1, 1980 with a supporting memorandum and affidavits from each of Respondents' attorneys. Also submitted was a detailed description of all monies expended and debts incurred with an authenticating affidavit based on vouchers, receipts, invoices and other legitimate records. The Petitioners filed their 46 page Suggestions in Opposition to Respondents' Request for Attorneys' Fees on or about July 11, 1980. Respondent filed a written response to Petitioners' "Suggestions" on or about August 13, 1980.

A full evidentiary hearing on attorneys' fees and costs was held before Judge Elmo B. Hunter on February 23 and 24, 1981. Each of Plaintiffs' four attorneys testified and was cross-examined regarding his rates, activities and hours expended in this matter. Respondents presented oral testimony and documentary evidence on expenses.

On July 20, 1981, the District Court issued its Opinion and Order awarding $107,592.93 in attorneys' fees to plaintiffs' four lawyers and $23,646.42 for expenses.[1]

The District Court determined that the plaintiffs prevailed both in and out of the courtroom, through litigation and as a catalyst for change:

> The initial step required in an analysis of [42 U.S.C. 1988] is to determine if plaintiffs are to be considered the prevailing party to this litigation. Defendants in their 46 page brief in opposition to an award of attorney's fees argued strenuously that plaintiffs only prevailed on a portion of the many claims advanced. Hence, defendants argued that this Court should award a fee, if any, based upon a mechanical ratio of those claims in which plaintiffs were successful to those claims adversely to plaintiffs.
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> This Court was presented with the identical argument, recently in **Eckerhart v. Hensley**, No. 75-CV-87-C, (W.D. Mo., filed Jan. 23, 1981). For the reasons expressed in that opinion, this Court declines to adopt defendants' proportionate success formula. See also, **Planned Parenthood Assoc. v. Ashcroft**, Nos. 80-1130 and 80-1530, (8th Cir., filed July 8, 1981); and **Crain v. Mountain Home**, 611 F.2d 726, 729 n. 7, (8th Cir. 1979). In a case of this magnitude, involving the conditions in an important state institution, this Court refuses to attempt to artificially segregate the issues in this litigation and make isolated assignments of success. It is the opinion of this Court that the entire record in this case compiled over a seven-year period clearly reflects a monumental effort on the part of plaintiffs and a substantial degree of success in improving the conditions at MSP. The impact of the orders affecting overcrowding and medical treatment have had wide-ranging effects on the institution as a whole. Further, it would be incalculable to determine the degree of influence this litigation has had on state officials to bring about necessary changes at MSP. This Court is left with the distinct impression that this litigation was a crucial element in the forces seeking improvements at MSP in the last seven years. Therefore, this Court considers plaintiffs to have prevailed for purposes of 42 U.S.C. 1988. **Burks, et al. v. Bond, et al., supra**, pp. A-9 and A-10.

Judge Hunter characterized this litigation in the following language:

> The magnitude of this seven-year old litigation cannot be overstated. See, **Burks v. Walsh**, 461 F.Supp. 454 (W.D. Mo. 1978), aff'd. sub. nom **Burks v. Teasdale**, 603 F.2d 59 (8th Cir. 1979) and **Burks v. Teasdale**, 492 F.Supp. (W.D. Mo. 1980). This case involved a substantial constitutional challenge to many conditions of confinement at the Missouri State Penitentiary (MSP) in Jefferson City, Missouri. The two opinions of this Court identified constitutional deficiencies relating to the overcrowding and to the medical treatment of the inmates at MSP. Consistent with the preceding phases of this litigation, the questions relating to attorneys fees and expenses are intensely contested by the parties and have been briefed and argued in elaborate detail. **Burks v. Bond, supra**, pp. A-3 through A-4.

The District Court concluded that Respondents' lead attorney, Michael J. Hoare, expended a total of 1226.78 compensable hours during the period March 1978 through February 1981 and therefore had earned and was entitled to a reasonable attorney's fee of $70,960.50. The District Court concluded that Respondents' attorney Richard

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[1]**Burks v. Bond**, (C.A. Nos. 77-4008-CV-C; 75-100-CV-C; 74-4093-CV-C, W.D. Mo., July 20, 1981). The District Court's Opinion and Order is attached to the Petition For a Writ of Certiorari as Appendix B, pp. A-3 through A-25.

Boardman had expended a total of 528.8 compensable hours during the period commencing May 1975 through February 1981 and had earned and was entitled therefore to a reasonable attorney's fee of $23,854.76. The District Court concluded that Respondents' attorney Steven Gladstone had expended a total of 215.3 compensable hours during the period commencing 1975 through February 1981 and had earned and was entitled therefore to a reasonable attorney's fee of $8,957.63. The District Court concluded that John Lynn had expended a total of 372.8 hours during the period commencing June 1978 through February 1981 and had earned and was entitled therefore to a reasonable fee of $3,820.04.

The District Court specifically concluded that the above fees constituted "reasonable attorneys fees for this action" **Burks v. Bond, supra,** p. A-21.

The District Court's memorandum decision details its analysis using the standards articulated in **Johnson v. Georgia Highway Express,** 408 F.2d 714 (5th Cir. 1974). The District Court considered the time and labor involved, the novelty and difficulty of the question, the skill requisite to perform the legal services properly, the preclusion of other employment due to acceptance of the case, each counsel's customary fee, whether the fee arrangement was fixed or contingent, the time limitations imposed by the client or the circumstances, the amounts of money involved and the results obtained, the experience, reputation, and ability of the attorneys, the undersirability of the case, the nature and length of professional relationships with the clients, and awards in similar cases. Regarding the "amount involved and the results obtained," the court observed:

> This was not a damage action, so there was no monetary relief afforded. But, two injunctions have been issued that have substantially altered conditions at MSP. The overall impact of this litigation upon the lives of the inmate class would be difficult to measure. Nevertheless, the reduction of the overcrowding situation and the improvements in medical care will have a significant positive effect on the lives of the inmates. **Burks v. Bond, supra,** pp. A-19 and A-20.

It is fair to say that the Petitioners contested everything sought by Respondents. The District Court noted that it had been ". . . drawn into the minutia of an exhaustive and tedious dispute between the parties. . . ." **Burks v. Bond, supra,** p. A-10. The District Court, however, entered complete findings with respect to each of the guidelines set out in **Johnson v. Georgia Highway Express, supra.**

The Petitioners have not challenged a single finding as clearly erroneous.

The District Court also awarded Respondents expenses in the amount of $23,646.42.[2] These out-of-pocket expenses are attributable to expert witnesses, depositions, transcripts, attorney expenses, law clerk salaries, telephone charges, copying costs, publications, expedited mail delivery, typing services, photographs and office rental. In determining the expenses appropriate for reimbursement in this litigation, the court considered plaintiffs' Exhibit No. 7 which it concluded "adequately lists all of these expenses." **Burks v. Bond**, **supra**, p. A-23. In its decision, the trial court considered each of the Petitioners' objections to the expenses and entered appropriate conclusions with respect to each such objection. The defendants have not objected to any determination by the District Court as clearly erroneous.

B. Facts Relevant to the Underlying Litigation Against the Missouri State Penitentiary.

This litigation was initiated in July 1975 under the style **Burks v. Graham**, No. 75-CV-149-C. It was dismissed without prejudice on January 3, 1977 and refiled on January 14, 1977 as **Burks v. Graham**, No. 77-408-CV-C. The Order of January 3, 1977 dismissing Civil Action No. 75-CV-149-C provided, in relevant part, for the costs of the original suit to be included in any final disposition of the re-filed action.

On September 15, 1975 **Burks v. Graham**, No. 75-CV-149-C was consolidated with **Thompson v. Teasdale**, No. 75-CV-100-C. On May 15, 1978 the Court consolidated **Burks v. Graham**, No. 77-4008-CV-C and **Hines v. Teasdale**, No. 78-4093-CV-C.

Burks v. Graham, No. 75-CV-149-C was tentatively certified by the court as a class action on July 11, 1975. The court entered an Order on September 18, 1978 that this matter and the consolidated cases proceed as a class action in the issues of overcrowding, sanitary conditions and medical care.

The original pleadings concerned numerous issues including: (1) overcrowding and sanitary conditions, (2) inadequate medical care, (3) abuse of behavior-modifying drugs, (4) denial of adequate protection of inmates, (5) interference with inmate mail, (6) improper screening of inmates' legal documents, i.e., use of "drop boxes," (7) lack of due process prior to confinement in punitive segregation, and (8) unauthorized practice of medicine by unlicensed and untrained personnel.

Several of these issues were resolved after suit was filed and without the necessity for trial. For example, after suit was filed defendants abandoned their prior practice of requiring inmates seeking the services of a notary public for legal or other

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[2]Contrary to Petitioners' representation no award was made to the American Civil Liberties Union.

documents, to place such documents in a centralized "drop box" labeled "inmate legal papers" for processing by defendants' custodial officers who reportedly reviewed the contents of such documents allegedly in violation of the First and Fourteenth Amendments. Defendants agreed to discontinue the "drop box" procedure, to utilize a civilian employee as a notary public and to notarize documents submitted to this employee without monitoring or screening the contents of the subject document. Also, with defendants agreement to provide medical attention to several of the named plaintiffs, these individual claims were dismissed from the lawsuit. By agreement of counsel, the question of the mail procedures at MSP was struck without prejudice.

After multiple communications between the parties and two conferences with the court, the contested claims were identified as (1) overcrowding, (2) sanitation, (3) medical care, and (4) due process in connection with confinement to punitive segregation.

The claims were bifurcated for separate trials. The overcrowding and sanitation claims were tried on September 25 through September 29, 1978 and concluded on October 5, 1978. **Burks v. Walsh**, 461 F.Supp. 454 (W.D. Mo. 1978). The medical claims were tried during the period February 11 through February 22, 1980. **Burks v. Teasdale**, 492 F.Supp. 650 (W.D.Mo. 1980). The due process claim was not tried because of a determination by Respondents' counsel, without regard to the practice and procedures in effect when this litigation was initiated, that the Petitioners' operation at the time of trial was in apparent compliance with **Wolff v. McDonnell**, 418 U.S. 539 (1974) and its progeny.

(1) Overcrowding

The District Court concluded that although the MSP was overcrowded, as a whole it was not so overcrowded as to be intolerable, inhumane, totally unreasonable, in light of the modern conscience or shocking to the conscience of the court. See, **Burks v. Walsh**, supra, 461 F.Supp. at 487.

The court determined too, however, that double celling of inmates in Housing Units #2, #5 and the Special Treatment Unit and the triple celling in the Adjustment Unit (Punitive Segregation) and the Administrative Segregation Unit and Housing Unit 1 (The Diagnostic Center) each constituted ". . . a living condition which [is] intolerable, inhumane, totally unreasonable in light of the modern conscience, and shocking to the conscience of the court, in violation of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution." Id. 461 F.Supp. at 487 et seq.

The court entered these finding after considering:

> The totality of the circumstances which exist at the Missouri State Penitentiary, inlcuding but not limited to, the ability of inmates to move outside their cells during the day and evening hours, and to participate in numerous work, recreation, education, social, and service programs, and including also the high quality of the administration of staff employed at the penitentiary . . . Id. at 487.

The court enjoined the defendants from double celling in the Adjustment Unit; triple celling in the Administrative Segregation Unit; triple celling in the Diagnostic Center; double celling in the Special Treatment Unit; and double celling prisoners in Housing Units 2 and 5.

The elimination of double celling in Housing Units #2 and #5 was particularly important to the over-all operation of MSP. At the time of trial in 1978, Housing Unit #2 contained at least 368 cells (each measuring 476 square feet) and housed 642 prisoners, or 27 percent of MSP's prisoner population.[3] Housing Unit #5 contained 364 cells (47 square feet) and housed 630 prisoners, or 27 percent of the relevant prisoner population. These two Housing Units housed more than 50 percent of the prisoner population. Thus, the reduction by one-half of the population in Housing Units #2 and #5 served to reduce MSP's population by at least 25 percent and, consequently, relieved the pressures caused by overcrowding and made more readily available to each remaining prisoner, opportunities for jobs, recreation, education, medical care, etc.

Plaintiffs appealed from the district court's "overcrowding" decision.[4] The Court of Appeals affirmed the District Court's decision ". . . subject to the observations, requirements and possible caveats . . . stated . . . " **Burks v. Teasdale,** 603 F.2d 59, 63 (8th Cir. 1979). The Court of Appeals noted inter alia the appropriateness of requiring defendants to submit progress reports, questioned the timetable for the conversion of Housing Units #2 and #5 to single cells and, encouraged the District Court to "keep a close watch on the situation in Housing Unit No. 3 . . . " Ibid. The Court of Appeals concluded that "whether constitutionally required or not, (we think) double-celling in (Housing Unit #3) ought to be eliminated when practicable" Ibid. In response, on remand, the District Court conferred with counsel on September 9, 1979 and inter alia

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[3]This figure is exclusive of Housing Unit No. 7 located outside the MSP walls (which housed 112 prisoners as of July 1, 1978) and Housing Unit No. 1, a/k/a, the Diagnostic Center or the receiving unit, where new prisoners remain for one - five weeks for evaluation and assignment to permanent quarters within MSP or other institutions operated by the State of Missouri.

[4]The principal issue on appeal was whether the district court erred in not prohibiting double-celling in Housing Unit No. 3, constructed in 1865, where each of the 222 cells measured 65 square feet. These cells are 1 inch narrower, 22 inches longer and 4 inches shorter than the cells in Housing Units 2 and 5 which were determined to be unfit for double-celling.

inquired whether the population reduction could be expedited and directed the Petitioners to file a progress report on their compliance with the court's previous directives. the report was filed September 27, 1979. In it the then Director of the Division of Corrections' (Mr. David Blackwell), stated the intention to convert Housing Unit #3 to "single celling after the new 500-man Eastern Missouri Medium Security Prison in St. Louis County is open". The Director's stated "intent" to single cell Housing Unit 3 reflects substantial progress over the aspiration expressed at trial in 1978 by the former Director Mr. James Walsh.[5]

(2) The Health Care Delivery System

Respondents claimed the Petitioners' health care delivery system either contained systemic deficiencies reflecting deliberate indifference on an institutional-wide basis or was so inadequate as to result in inevitable suffering.[6] Thus, as with the overcrowding issue tried earlier, Respondents' counsel was concerned with the "totality of the circumstance". The principal factual issue concerned whether there exists a demonstrable relationship between adequate medical care and proper medical records; the principal legal issue concerned the constitutional status of Petitioners' medical records and related systems.

The District Court in **Burks v. Teasdale,** supra., 492 F.Supp. at 676, concluded that:

> The medical records at MSPH are constitutionally infirm. The evidence is replete with examples of inadequate, inaccurate and unprofessionally maintained medical records. This Court rejects defendants' contention that there is an insignificant relationship between proper medical records and adequate medical care . . . Plaintiffs' experts clearly demonstrated the critical importance of adequate and accurate medical records in any attempt to provide a continuity of medical care. . . The failure over at least the past five years of prison authorities to remedy this situation demonstrates a sufficient deliberate indifference given the substantial risk that the deficiencies in the records pose to the inmates (citations omitted). The maintenance of proper medical records will serve a parallel objective of providing accurate documentation of the care received by inmates thereby insuring objective bases for review and evaluation of the level of the quality and results of the treatment provided.

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[5]At trial, on October 5, 1978, Mr. Walsh stated "it would be my hope that the administration would try to single cell the smallest possible cells, and if they double cell, it would be the larger units like Housing 4 with 104 square foot" (Trial Transcript, Vol. VI, p. 1102)(emphasis added).

[6]See, **Todaro v. Ward,** 431 F.Supp. 1129, aff'd., 565 F.2d 48 (2 Cir. 1977) and **Estelle v. Gamble** 429 U.S. 97 (1976).

> . . . The present system of record keeping is so deficient that it results in a very grave risk of unnecessary pain and suffering. Any acceptable remedy of this condition will require an analysis of all the factors relating to medical care production and maintenance - including staff training and evaluative review of staff performance.

Judge Hunter characterized the importance of medical records as "critical." **Burks v. Teasdale,** supra. 492 F.Supp. at 676. He observed then that "any acceptable remedy of this condition" would impact on staff training and evaluative review of staff performance. Ibid.

Ultimately, after a full hearing on appropriate remedies, the district court, on June 29, 1981 ordered the Petitioners, among other things, to initiate a medical records review of process which would include (1) at least one physician member who was not connected to the operation at MSPH in any manner; (2) a random selection process for medical files that will provide completely blind selection of an adequate number of files for a truly representative sample; (3) written standards or criteria for review of the files; (4) the production and maintenance of minutes of the proceedings of the review committee.

The district court also enjoined the Petitioners from the performance of surgery by non-physicians during non-emergency situations. Also, an injunction issued requiring the acquisition, and assuring the availability of, adequate life-saving equipment for those prisoners in Petitioners' Intensive Care Unit. **Burks v. Teasdale,** supra, 492 F.Supp. at 676 and 678.

The scope of the medical care issues extended beyond the walls of MSP. Respondents' evidence demonstrated that the Petitioners use of University of Missouri's Medical Center at Columbia, the Veterans Administration Hospital, the Fulton State Mental Hospital, etc., presented constitutional problems with respect to (1) the unreasonable delays prior to transfer to the referral institutions of prisoners who require the services of such institutions and (2) the premature return of the same prisoners to MSPH against physician advice. In other words, inmates experienced inordinate delays in getting to these referral institutions and, because of the lack of adequate custody personnel, in many instances have been returned to the MSPH prematurely causing a "substantial deleterious effect" on the prisoners' medical condition. Id. at 677. A new court ordered policy is now in effect which will prevent these regretful incidents.

Respondents' evidence also demonstrated that the Petitioners' use of its psychiatric unit was unconstitutional in two regards: (1) the psychiatric unit had been misused and the prisoners abused in the sense that custody personnel were accustomed to making determinations as to which prisoners would be confined to the psychiatric unit; (2) the evidence demonstrated the "complete lack of a systematic policy for the

use of seclusion and/or restraints" within the psychiatric unit. **Burks v. Teasdale,** supra, 492 F.Supp. at 679. Again a new court ordered policy is now in effect, because of this litigation, which will prevent these regretful past practices.

Thus, because of Respondents' efforts in connection with the medical issues, the court, among other things, ordered the Petitioner to initiate and maintain a medical records system at MSPH (where none existed previously), to initiate record keeping training sessions (where none existed previously), to establish a medical review committee (where none existed previously), to initiate a humane and medically sound transfer policy with respect to MSPH's referral institutions (where none existed previously), to initiate a policy on the use of its pyschiatric ward including the use of restraints (where none existed previously).

Independent of the concrete objectives achieved by way of litigation, the spector of this litigation impacted significantly on Petitioners operation even prior to the first trial in 1978 and was the catalyst for substantial change. Judge Hunter concluded ". . . be incalcuable to determine the degree of influence this litigation has had on state officials to bring about the necessary changes at MSP. This Court is left with the distinct impression that this litigation was a crucial element in the forces seeking improvements at MSP in the last seven years." **Burks v. Bond,** supra, A-10. Petitioners do not challenge these findings as clearly erronous.

This suit was repeatedly cited by Petitioners in the division of Corrections' Budget Requests as early as June 1976 in support of its urgent need for remedial funding. Indeed, in a Special Session of the Legislature during 1977 some $37,000,000 were appropriated for the construction and renovation of new penal institutions in Missouri. Senator Donald L. Manford, Chairman of the Senate Appropriations Committee, is reported to have had the following exchange with Warden Donald Wyrick before a meeting of the Senators' Committee:

> Q. One of the things I am concerned about, and I wanted to bring out before the Committee is the fact that there is a suit pending in federal district court now about overcrowding and it is pending in the U.S. District Court for the Western Court of the City and I have read that petition. It has not been set for hearing but I could conceive that the federal court would take that suit and start directing this Committee and the Missouri Senate and the Missouri General Assembly where to build facilities and how to build them and who they would handle and I don't know if your attorneys have looked into that fact, but I think it is a very real danger.
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> A. It is possible, of course, the Attorney General is handling the suit and not being an attorney, I don't really know what might happen but it is a very serious suit and we are taking it that way.

By way of further example is the role played by James D. Henderson, one of Petitioners' expert witnesses in the overcrowding case. Mr. Henderson toured MSP in 1976 to

prepare his testimony. He recommended changes, which were subsequently implemented, pursuant to which, defendant inter alia initiated a new policy whereby beds were installed for all prisoners in Punitive Segregation and the cell size in the Punitive Segregation actually was increased (testimony of James Henderson, October 5, 1978, Vol. VI, p. 1154 et seq.) This situation was similar with respect to the medical issues. One of defendants' expert witnesses in the medical case, Dr. Pasquale Ciecone, testified that he also toured MSP to prepare his testimony. He said he made at least a dozen recommendations for change, each of which was implemented.

SUMMARY OF ARGUMENT

I. There is no present conflict among the Circuit Courts regarding a District Court's discretion under 42 U.S.C. 1988 to award a prevailing plaintiff reasonable attorneys' fees for professional services reasonably rendered on factual and/or legal issues relating to the successful claim without regard to whether the party prevailed also on each of the related factual and/or legal issues.

II. This Court and the Courts of Appeals have consistently held that District Courts have discretionary authority to award costs and expenses not specifically allowed by statute. The Court of Appeals below held the District Court properly exercised that discretion and there is no need for further review by this Court.

ARGUMENT

I. The Court Below Properly Determined that the Respondents Substantially Prevailed And Were Entitled Therefore to a Reasonable Attorney's Fees for All Work Performed on Legal and Factual Issues Relating to Their Successful Claims.

Petitioners urged the District Court to award fees in accordance with the wooden rule whereby ". . . an attorney is only entitled to the award of fees for the time devoted to those issues on which he has been successful." (Defendants' Suggestions in Opposition to Plaintiffs' Request for Attorneys' Fees, filed on or about July 11, 1980, p. 29). The District Court rejected the petitioners' position and used a more elastic measure, saying:

> . . . This Court declines to adopt defendants' proportionate success formula. [citations omitted]
>
> In a case of this magnitude, involving the conditions in an important state institution, this Court refuses to attempt to artificially segregate the issues in this litigation and make isolated assignments of success. It is the opinion of this Court that the entire record in this case compiled over a seven year period clearly reflects a monumental effort on the part of plaintiffs and a substantial degree of success in improving the conditions at MSP. The impact of the orders affecting over-crowding and medical treatment have had wide-ranging effects on the institution as a whole. Further, it would be incalculable to determine the degree of influence this litigation has had on state officials to bring about necessary changes at MSP. This Court is left with the distinct impression that this litigation was a crucial element in the forces seeking improvements at MSP in the last seven years. Therefore, this Court considers plaintiffs to have prevailed for purposes of 42 U.S.C. 1988. **Burks, et al. v. Bond, et al.** (Civil Action Nos. 77-4008-CV-C; 75-100-CV-C; 78-4093-CV-C, W.D. Mo., July 20, 1981) (attached to Petition For a Writ of Certiorari, Appendix B, pp. A-9-10).

Petitioners argue in this Court that Respondents' claims regarding overcrowding and sanitary conditions involved separate factual and legal issues which the District Court should have segregated for purposes of determining counsel's compensation. Petitioners argue similarly with respect to Respondents' claims that the Petitioners' health care delivery system was operated in an unconstitutional manner.

Contrary to the defendants' arguments, and as evidenced by the reported decisions in this case, the matters characterized by Petitioners as multiple claims were really subsidiary factual or legal issues relating to one of Respondents' two principle claims: (1) the Missouri State Penitentiary was so overcrowded as to violate constitutional imperatives, **Burks v. Walsh**, 461 F.Supp. 454, 456 (W.D. Mo. 1978), aff'd. sub nom **Burks v. Teasdale**, 603 F.2d 59 (8th Cir. 1979), and (2) the health care delivery system at the MSP either contained systemic deficiencies reflecting deliberate indifference on an institution-wide basis or was so inadequate as to result in inevitable suffering, **Burks v. Teasdale**, 492 F.Supp. 650, 675 (W.D. Mo. 1980). In both instances,

Respondents' claims were institutional in nature and subject to the nuances of many subsidiary factual and legal issues.

Respondents prevailed below on both claims in significant ways. As noted by the District Court, "The magnitude of this seven year old litigation cannot be overstated." **Burks v. Bond, supra,** Petitioners' Appendix B, pp. A-3. The District Court properly concluded that this prison case defies compartmentalization. The District Court also observed that any attempt to segregate the issues to make isolated assignments of success would be artificial. **Burks v. Bond, supra,** Petitioners' Appendix B, p. A-9. The cases and counsels' efforts must be viewed in their entirety. If plaintiffs prevailed in any significant manner:

> . . . Plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.[7]

Thus, absent circumstances which would make such an award unjust,[8] a District Court may properly award fees to a prevailing plaintiff's counsel for time expended on subsidiary legal and factual issues in those instances, among others, where they are determined to be related to the claim(s) on which he prevails.

Petitioners concede that the District Court's analysis and conclusions are consistent with the case law as set forth in **Jones v. Diamond,** 636 F.2d 1364 (5th Cir. en banc 1981), cert. dismissed, 102 S.Ct. 27 (1982), **Gurule v. Wilson,** 635 F.2d 782 (10th Cir. 1980), **Siegal v. Merrick,** 619 F.2d 160 (2nd Cir. 1980), **Northcross v. Board of Education,** 611 F.2d 624 (6th Cir. 1979), and **Lamphere v. Brown University,** 610 F.2d 46 (1st Cir. 1979).

Petitioners mistakenly rely on **Copeland v. Marshall,** 641 F.2d 880 (D.C. Cir. 1980), **Nadeau v. Helgemoe,** 581 F.2d 275 (1st Cir. 1978), **Hughes v. Repko,** 578 F.2d 491 (3rd Cir. 1978), **Muscare v. Quinn,** 614 F.2d 577 (7th Cir. 1980), **Schaeffer v. San Diego Yellow Cabs, Inc.,** 642 F.2d 1002 (9th Cir. 1972) and **Bethy v. Alameda County**

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[7]**Brown v. Bathke,** 558 F.2d 634, 637 (8th Cir. 1978) quoting **Davis v. County of Los Angeles,** 8 E.P.D. ¶9444 (C.D. Cal. 1974), quoted with approval in S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), p. 5.

[8]Counsel's pursuit of "manufactured" and "clearly frivolous" issues would not be compensable as time reasonably expended. **Brown v. Bathke, supra,** 588 F.2d at 637. Petitioners have not argued these characteristics are appropriately used with respect to any issue or claim in this litigation.

Water District, 602 F.2d 894 (9th Cir. 1979)[9] to generate a supposed conflict among the Circuit Courts regarding the propositions set out in **Brown v. Bathke, supra.** An examination of Petitioners' cases shows that there is no true conflict between any of the circuits and the prevailing law in the Eighth Circuit as applied to this case.

Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) as cited by the Petitioners speaks directly to the situation where plaintiffs prevailed on less than all of several separable claims and only indirectly to the question of success or failure on subsidiary factual or legal issues relating to the successful claims. However, the court in **Copeland, supra,** observed, in terms applicable to this case, that:

> No reduction in fee is appropriate where the "issue was all part and parcel of one matter," **Lamphere v. Brown University**, 610 F.2d 46, 47 (1st Cir. 1979), but only where the claims asserted "are truly fractionable." Id. **Copeland v. Marshall, supra,** 641 F.2d at 892, n. 18.

The same proposition is contained in **Muscare v. Quinn**, 614 F.2d 577 (7th Cir. 1980), **Nadeau v. Helgemoe**, 581 F.2d 275 (1st Cir. 1978) and **Hughes v. Repco**, 578 F.2d 483 (3rd Cir. 1978) relied upon by the Petitioners. The Court of Appeals in **Hughes v. Repco, supra,** 578 F.2d at 487, stated the proposition in the following language:

> . . . A prevailing party on a particular claim is one who fairly can be found by the District Court to have essentially succeeded on such claim, as "claim" is used in Fed. R. Civ. P. 10(b). We say, "essentially succeeded" because in many cases a party may prevail on his basic claim but not on all aspects thereof. Given the spirit and purposes of the statute, we think our test allows the District Courts to meet their obligation under the Act. Thus, we believe that plaintiffs here essentially prevailed on their §1982 claim against Mrs. Repco, even though they were denied punitive damages and even though their request that the attorney's fee question be decided by the jury was rejected. The application "essentially successful" standard normally is left, of course, to a sound exercise of the discretion by the District Court in the first instance.

Fees were reduced in **Hughes v. Repco, supra,** because the plaintiffs were unsuccessful in claims other than the 42 U.S.C. §1982 claim referenced above. See also **Nadeau v. Helgemoe, supra,** 581 F.2d at 279. Similarly, in **Muscare v. Quinn**, 614 F.2d 577 (7th Cir. 1980), the plaintiff asserted two independent claims and prevailed on one of them. **Muscare, supra,** 614 F.2d at 580. The Court of Appeals for the Seventh Circuit has since indicated its willingness to compensate a prevailing party for reasonable efforts undertaken in connection with a subsidiary factual or legal issue related to a successful

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[9]Petitioners' reliance on these two Ninth Circuit Court of Appeals decisions is, at best, tenuous in light of subsequent decisions from that Circuit indicating adherence to the propositions basic to **Brown v. Bathke, supra.** See, **Gluck v. American Protection Industries, Inc.**, 619 F.2d 30, 33 (9th Cir. 1980) and **Seattle School District No. 1 v. Washington**, 633 F.2d 1338, 1349-1350 (9th Cir. 1980).

claim. **Syvock v. Milwaukee Boiler Manufacturing Company, Inc.**, 665 F.2d 149, 162-165 (1981).

II. The Court Below Acted Properly and in a Manner Consistent With Decisions of this Court and Other Courts of Appeals in Awarding Certain Costs and Expenses Not Specifically Allowed by Statute.

Petitioners contend that courts have no authority or discretion to award costs and expenses not specifically allowed by statute. This Court addressed that issue in **Farmer v. Arabian American Oil Co.**, 379 U.S. 227 (1964), and upheld the power of courts to award such costs under Rule 54(d), F.R.Civ.P. Cautioning that the discretion should be exercised with restraint, the Court stated: "Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." 379 U.S. at 235.[10]

The District Court below exercised its discretion in taxing costs and expenses against Petitioners, allowing some items and denying others. The District Court's action was carefully reviewed by the Eighth Circuit Court of Appeals and no abuse of discretion was found. There is no need for further review by this Court.[11]

This Court need not involve itself in defining further the standards to be applied by the District Courts in the exercise of their discretion. The Circuit Courts generally are applying the same standards in their decisions.

In civil rights cases, the Courts of Appeals that have ruled on these issues are all in agreement with the Eighth Circuit's decision below that litigation expenses, including expert witness fees, may be awarded in appropriate circumstances.[12]

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[10]**Henkel v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.**, 284 U.S. 444 (1932), relied on by Petitioners, was not a case where the Court was called upon to construe the prevailing federal costs statutes, but required the Court only to determine whether federal or state law governed the award of costs. While **Henkel** pre-dated the Federal Rules of Civil Procedure, the Court noted that it had held previously that courts do have discretion to award the fees of a court-appointed expert, even though such fees are outside of the court's statutory authority. 284 U.S. at 244.

[11]That the Circuit Courts are fully capable of monitoring the District Court's discretion in this area is evidenced by the historic lack of intervention by this Court. As far as Respondents are aware, since **Henkel, supra**, was decided in 1932, this Court's only decision involving litigation costs was its 1964 decision in **Farmer, supra.**

[12]**Jones v. Diamond**, 636 F.2d 1364, 1382 (5th Cir. en banc 1981), cert. dismissed, 102 S.Ct. 27 (1982); **Northcross v. Board of Education**, 611 F.2d 624, 639-40 (6th Cir. 1979); **EEOC v. Kenosha Unified School District No. 1**, 620 F.2d 1220, 1227-28 (7th Cir. 1980); **Thornberry v. Delta Air Lines, Inc.**, 676 F.2d 1240, 1244-45 (9th Cir. 1982). The Fourth Circuit is in agreement with the above cases that litigation expenses related to the attorneys' work are compensable, but has made no holding with respect to expert witness fees. **Wheeler v. Durham City Board of Education**, 585 F.2d 618, 623-24 (4th Cir. 1978). See also **Pennsylvania v. O'Neill**, 431 F.Supp. 700, 713-15 (E.D. Pa. 1977), affirmed without opinion, 573 F.2d 1301 (3rd Cir. 1978).

The legislative history of the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. §1988, provides strong support for District Court's and Court of Appeals' decisions below. The Congressional committee reports recommending passage of the Act repeatedly assert the intent of Congress to make it possible for the most impecunious citizens to vindicate their important civil rights.[13] In comments made in debate on the Act in the House of Representatives, a key sponsor, Representative Drinan addressed more directly the question whether out-of-pocket expenses and expert witness fees may be awarded under the Act:

> I should add that the phrase "attorney's fee" would include the values of legal services provided by counsel, including all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 C.R. H12160 Daily Ed. (1 Oct. 1976)

The **Senate Committee Report**, 94-1011, 94 Cong. 2d Sess. (1976), discusses the appropriate standards to be applied in awarding attorney's fees under the Act. It indicates that the standards should be generally the same as those under the fee provisions of the Civil Rights Act of 1964. It points to three District Court cases in which the standards have been correctly applied. In one of these, **Davis v. County of Los Angeles**, 8 E.P.D. ¶9444 (C.D. Cal. 1974), plaintiffs' counsel had submitted a bill for expert witness fees in its attorney's fee request. The court calls these charges "valid" and includes the amount requested in the fee award. Id. at p. 5048.

Even in cases not involving civil rights statutes the lower courts are in general agreement that the taxation of costs for non-statutory expenses, including expert witness fees, is within the discretion of the District Court. See, **Roberts v. S.S. Kyriakoula D. Lemos**, 651 F.2d 201 (3rd Cir. 1981), and cases cited therein. The cases cited by

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[13]**The House Committee Report**, 94-1558, 94th Cong., 2d Sess. (1976) identifies the purpose and application of the Act:

> In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law. p. 1.

The same purpose is reiterated in the **Senate Committee Report**, infra:

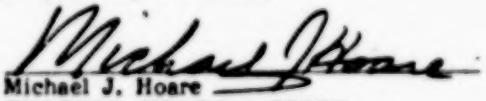
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. p. 2.

Petitioners create no conflict with that position sufficient to warrant intervention by this Court.[14]

CONCLUSION

The Court of Appeals properly affirmed the District Court's exercise of discretion in awarding the prevailing party reasonable attorneys' fees, costs and expenses. As this Court already has held that District Courts have discretion to award costs and expenses beyond those allowed by statute, and there is no conflict in the Circuits on the issue, the petition for certiorari should be denied as to that question. Because there is no present conflict among the circuits on the law applicable to the attorneys' fees question raised by this case, the petition for certiorari should be denied on that issue as well.

Respectfully submitted,



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[14] While Baum v. United States, 432 F.2d 85 (5th Cir. 1970) denied expert witness fees, it stated the issue is "discretionary with the courts under Rule 54(d)." 432 F.2d at 86. In Wehr v. Burroughs Corp., 477 F.Supp. 1012, 1022 (E.D. Pa. 1979), affirmed, 619 F.2d 276 (3rd Cir. 1980), the District Court recognized the rule allowing taxation of expert witness fees, but did not apply it because the expert did not testify at trial. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 223-24 (9th Cir. 1964), denied "accounting fees," not "expert witness fees" as petitioners contend; and in any event, predated Farmer v. Arabian American Oil Co., supra. Wahl v. Carrier Manufacturing Co., 511 F.2d 209, 217 expressly recognized the District Court's discretion under Farmer to tax costs not specifically allowed by statute. In Kinsey v. Legg Mason Wood Walker, 23 F.E.P. Cases 774, 777 (D.D.C. 1978), affirmed without opinion, 585 F.2d 572 (D.C. Cir. 1978), the District Court exercised its discretion in disallowing non-statutory costs. City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1371 (1st Cir. 1971), recognized Farmer, and while it denied certain cost items, it upheld others as "within the court's discretion."

NO. 82-747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHRISTOPHER BOND, LAWRENCE GRAHAM, GEORGE CAMP, EDWARD HAYNES, and DONALD WYRICK,
Petitioners,

v.

CALVIN BURKS, JAMES X. HALL, ROOSEVELT MARTIN, WILLIE NORWOOD, DOUGLAS W. THOMPSON, JAMES E. WILLIAMS and DARRYL HINES, and all other prisoners similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondents, pursuant to Supreme Court Rule 46, and by their counsel, respectfully request leave to proceed herein in forma pauperis.

Leave to proceed on appeal in forma pauperis was sought by respondents in the District Court for the Western District of Missouri, in a motion filed on or about December 5, 1978. Leave was granted by said court on December 12, 1978.

Because this matter has been certified as a class action involving the prisoners at the Missouri State Penitentiary and in view of the difficulties attendant to securing affidavits from all members of the subject class, as they did in the district court, respondents also seek leave to rely on the attached affidavit of counsel in lieu of affidavits from members of the subject class.

The grounds for this motion are set forth in the attached affidavit of counsel.

Respectfully submitted,

CHACKES, HOARE & SEDEY

Michael J. Hoare

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF COUNSEL IN SUPPORT OF RESPONDENTS' MOTION TO PROCEED IN FORMA PAUPERIS

Michael J. Hoare, counsel for the respondents in the above captioned case, deposes and says as follows in support of respondents' Motion for Leave to Proceed In Forma Pauperis:

1. I am counsel for the respondents herein and was counsel for plaintiffs/appellees below.

2. On September 18, 1978, the district court entered an order certifying this case as a class action. By a previous order, the district court consolidated **Burks v. Walsh**, 77-4008-CV-C with two other actions, **Thompson v. Teasdale**, 75-CV-100-C and **Hines v. Teasdale**, 78-4093-CV-C, wherein inmates had been proceeding pro se.

3. Since March 1978, when I entered by appearance, I have corresponded and conferred personally with numerous members of plaintiffs' class in **Burks v. Walsh** who are incarcerated at the Missouri State Penitentiary (MSP). In addition, I have personally met and conferred with Mr. Douglas Thompson (**Thompson v. Teasdale**) and Mr. Darryl Hines (**Hines v. Teasdale**).

4. On information and belief, I know of no member of plaintiffs' class in **Burks v. Walsh** who is able to pay the costs of these proceedings or to give security

5. On information and belief, I believe the practice and policy of the defendant Department of Correction prohibits inmates from collecting, gathering, soliciting or amassing funds from each other or others for any reason.

6. On information and belief, I believe that many of the above referenced inmates are employed presently, as are other inmates at MSP, but receive meager wages. In most instances these wages are needed to purchase the basic necessities of life, and little remains for other purposes.

7. I have no knowledge of any inmate's income from any business, profession, bank account, real estate, securities or other properties, real or personal.

8. None of the Respondents' atorneys has received any remuneration for any services rendered in this litigation to date.

Michael J. Hoare
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Attorneys for Respondents
314 North Broadway
St. Louis, Missouri 63102
314/241-7961

Subscribed and sworn to before me this 15 day of December, 1982.

Notary Public

My Commission Expires:

KENNETH M. CHACKES
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS CO.
MY COMMISSION EXPIRES SEPT. 28 1984

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to Rule 28.5, Rules of the Supreme Court, he has served a copy of the foregoing motion and affidavit upon all parties required to be served by depositing same in a United States mailbox, first class postage prepaid, addressed to John Ashcroft, Attorney General and Michael Boicourt, Assistant Attorney General, Broadway State Office Building, P.O. Box 899, Jefferson City Missouri, 65102-0899, this 15 day of December, 1982.